

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





77-1231

To be argued by MARTIN H. JAFFE

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

-----  
UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
-against-  
  
CAHKKRIP GITTISRIBOONGUL, a/k/a  
CHAKKRIT GITTEARIBOONGUL, a/k/a  
CHAK,  
  
Defendant-Appellant.  
-----

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BRIEF OF AND APPENDIX OF  
DEFENDANT-APPELLANT  
-----



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PAGINATION AS IN ORIGINAL COPY



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ISSUE PRESENTED

1. Whether the exclusive use of leading questions in a Grand Jury presentation is a constitutional deprivation of the defendant's rights under the Fifth Amendment to the United States Constitution?

### STATEMENT OF THE CASE

The instant indictment charged appellant with violations of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) and Section 812; possession with intent to distribute and distribution (1 count) and conspiracy to unlawfully possess with intent to distribute (1 count).

The trial commenced February 18, 1977, and concluded on February 23, 1977.

During the course of the trial, a motion was made to dismiss the indictment on the ground that Count 1 (the conspiracy count) was based on the exclusive use of leading questions in the Grand Jury which deprived the defendant of his rights under the Fifth Amendment to the United States Constitution. A motion was made to dismiss Count 2 (the possession with intent to distribute and distribution count) on the ground that no evidence was introduced in the Grand Jury.

Appellant was convicted of both counts.

The District Court Judge denied the motion regarding Count 1 and granted the motion regarding Count 2.

Appellant was sentenced to eight (8) years in jail, and placed on special parole for a term of three (3) years, and is presently incarcerated.

The Notice of Appeal was filed within the statutory period.



### STATEMENT OF FACTS

Chali Prateepmanowong, an indicted co-conspirator, testified that in June of 1976, the appellant, CHAKKRIP GITTESBRIGOONGAL, gave him one (1) ounce of heroin to sell to Chal Praleepmanowong's friend, Check Fong (P. 40).\*

Chali returned to Chinatown and gave the appellant two thousand (\$2,000.00) dollars for the heroin that he had received from Check Fong (P.43).

Chali testified that arrangements were made with the appellant for a further sale of heroin (P.44-55).

He testified that he went to LaGuardia Airport with Check Fong and flew to Tampa Airport where he met the appellant (P.55,56).

He further testified that he, Check Fong, two of Check Fong's friends (who were undercover DEA a-ents) went to a restaurant. The appellant stated that he only had six (6) ounces of heroin to sell (P.60).

He testified that appellant left the table to make a telephone call and when he came back to the table, he said the call was to have the stuff brought over (P. 61,62).

That a while later a Dang arrived and gave a car key to the appellant (P.62). That the appellant and one of the DEA agents went outside (P.62).

That when the appellant came back, he said everything was okay (P.62). Chali Prateepmanowong further testified that he plead guilty to one count of an indictment which charged him

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\* Refers to Pages of the Trial Transcript.



with a violation of the Federal Narcotic Law in California (P.63). He testified that he entered a plea of guilty to Count 1 of the instant indictment, and that the government told him that if he helped the government by testifying, they would tell the Judge that he had testified (P.64).

The next witness was John Toal, a special agent with the Federal Drug Enforcement Administration. Agent Toal testified that after being on surveillance on June 15, 1976, he bought heroin from Check Fong for \$2,800.00 (P.190).

After making arrangements for another sale (P.190-206), Agent Toal got on a plane at LaGuardia Airport for Tampa, Florida. Agent Kibble was on the plane as was Check Fong and Chali Prateepmanowong. He testified that he gave \$17,000.00 in government funds to Agent Kibble to be used to purchase the half pound of heroin (P.206). He testified that he was introduced to the appellant at the Tampa Airport (P.210).

Agent Toal, Check Fong, Chali Prateepmanowong and the appellant went to a table at the restaurant. There he was told that appellant only had six (6) ounces to sell instead of the eight (8) ounces which was the original amount to be sold (P.212,213). He agreed to purchase the six (6) ounces (P.213). He testified that the appellant got up to make a telephone call and when he came back to the table he said, "Everything is all right" (P.214). After five (5) minutes, an Oriental came into the restaurant, went over to the



appellant and gave him keys (P.214). Immediately thereafter, the appellant told Agent Toal to go outside where they got into a white Cadillac (P.215). The appellant reached under the back of the front passenger seat and took out a large plastic bag and handed it to Agent Toal. At this time, Check Fong got into the back seat. Toal opened the bag, saw a brand name on it, Double Uoglobe, and inside was a white powder (P.216).

They drove to where Agent Kibble was waiting and Agent Toal told Agent Kibble to give \$13,500.00 to Check Fong. Fong thumbed through it and then the appellant asked for the money. Appellant then took the money and counted it (P.217).

James Kibble was the next government witness. He stated he was a special agent with the Drug Enforcement Administration. He testified that he boarded a plane at LaGuardia Airport and arrived in Tampa, Florida on June 30, 1976 (P.281,282). He testified that he saw appellant at the airport (P.283). He further testified that he went to a restaurant and waited, and that after approximately a half hour, Check Fong entered the restaurant and said that Agent Toal wanted him to come out (P.285). He observed Agent Toal and appellant in a white Cadillac and then got in the vehicle (P.285). He further testified that Agent Toal told him to take out \$13,500.00. He took it out and gave it to CheckFong, who in turn gave it to appellant (P.286).



The last government witness was Ronald Boston who stated he was a special agent with the Drug Enforcement Administration, Tampa, Florida. He testified that on June 30, 1976, he was assigned to conduct a surveillance at the Tampa International Airport (P.289). He testified that he saw the appellant at the Tampa Airport (P.294).

The government rested. Appellant rested.

Appellant was convicted of conspiracy, the other count was dismissed by the District Court Judge.



## POINT I

THE EXCLUSIVE USE OF LEADING QUESTIONS IN A GRAND JURY PRESENTATION IS A CONSTITUTIONAL DEPRIVATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND REQUIRES REVERSAL.

Oftentimes, in order to crystallize an issue, it becomes necessary to enumerate what is not the thrust of the argument. It is not the contention of the appellant that leading questions may not be utilized by the prosecutor in presenting the matter to the Grand Jury; it is not the contention that hearsay, incompetent or even illegally obtained evidence may not be utilized to secure an indictment. Indeed, there is a plethora of authority clearly on these above-mentioned issues settling the controversy.

It is the contention of the appellant that the manner of the presentation to the Grand Jury so poisoned the basic fairness of the proceeding as to violate the Fifth Amendment to the United States Constitution. It is the contention of the appellant that the presentation to the Grand Jury violated the due process clauses of the Fifth & Fourteenth Amendments to the United States Constitution; that the presentation subverted the historic function of the Grand Jury and turned the august body into a rubber stamp for the prosecutor, a vest pocket jury intimidated by the Government.

The origin of the Grand Jury as an accusatory body dates back to England in the year 1166 (I.W. Holdsworth, A History of English Law, 321). Of course, at that time, it not only



indicted, but it also determined the guilt or innocence of the accused. It was the general rule, so to speak, that the Grand Jury would acquiesce to the fancy of the Crown. The landmark Stephen Colledge and Earl of Shaftsbury cases however, changed all that. That Grand Jury took on the role, which we now view as its historic function, of privately examining witnesses in order to seek out the truth. That Grand Jury, notwithstanding marked pressure from the Government, declined to indict. Thus, the Grand Jury wrenched itself free of the Crown and continued, and supposedly still continues, free and independent of governmental influence. (See, generally Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Amer. Crim. Law Rev. 701).

The Supreme Court has held that the Grand Jury has been regarded as a "security to the innocent against hasty, malicious and oppressive prosecution, it (also) serves the invaluable function...of standing between the accuser and the accused... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390.

"The Grand Jury is not the tool of the prosecution." U.S. v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 525 (D.C.N.Y. 1974). In Kleen, supra, Judge Weinstein citing the Federal Grand Jury Handbook quoted in U.S. v. Cox, 342 F. 2d



167, 186 n.1 (5 Circ.) stated that the Grand Jury can still serve as

"both a sword and a shield of justice--a sword because it is the terror of criminals, a shield because it is the protector of the innocent against unjust prosecution".

Although not the case in Kleen, supra, the Court held that careless prosecutorial methods might so prejudice a defendant's rights as to cause a Court to raise the sword and shield of justice again. Appellant contends that the time is now.

There is adequate authority to the effect that a Court may quash an indictment if there is a total absence of competent or admissible evidence. Nanfito v. U.S., 20 F.2d 376 (8th Cir. 1927); Brady v. U.S., 24 F.2d 405 (8th Cir. 1928); U.S. v. Tane, 329 F.2d 848 (2nd Cir. 1964); Carrado v. U.S., 210 F.2d 712, cert. den.; Atkins v. U.S., 347 U.S. 1018, 74 S. Ct. 874; Manfredonia v. U.S., 347 U.S. 1020, 74 S. Ct. 876; Smith v. U.S., 349 U.S. 932, 75 S. Ct. 777; Stewart v. U.S., 300 F. 769; U.S. v. Gittisbriboongul, et al. (decision annexed). In Tane, supra, the Circuit Court held that a motion to dismiss an indictment because of the absence of incompetency of evidence

"...is addressed to the discretion of the Trial Court, and the decision to grant or deny the motion will not be reversed unless there has been an abuse of discretion". At 853.

There is no question that a court has the power to go back of an indictment to inquire whether vitiating irregularities



induced the finding. U.S. v. Gouled, 253 F.242; Laska v. U.S., 52 F.2d 672. In the instant case, the grand jury's testimony of the government's sole witness, Special Agent, John Toal, was elicited entirely and exclusively by virtue of leading questions. (See copy of Grand Jury transcript annexed hereto)

The test applied by the Grand Jury in voting upon an indictment is whether there is probable cause to believe that the accused has committed a crime. U.S. v. Cox, supra. In U.S. v. Estepa, 471 F.2d 1132, at P. 1136, Chief Judge Friendly stated:

"When the framers of the Bill of Rights directed in the Fifth Amendment that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' they were not engaging in a mere verbal exercise. The importance of avoiding undue reliance upon hearsay before a grand jury is heightened by this circuit's view that an indictment constitutes a finding of probable cause and avoids the need for a preliminary hearing under F.R. Cr. P 5(c)."

Therefore, the question becomes--could the grand jury find probable cause in the instant case when the only testimony before it was leading questions exclusively?

New York Federal Courts have decided on cases where other incompetent evidence such as hearsay evidence has been the basis for a grand jury indictment. In his dissenting opinion in U.S. v. Payton, C.A. 2d 365 F.2d 996, P. 999, Judge Friendly stated:

"The course followed by the Government in this case makes a mockery of the Fifth Amendment guarantee that 'No person



shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. What compromises this indictment is not that the grand jury heard only hearsay testimony as in Costello v. U.S., 350 U.S. 359, 76 S. Ct. 406 (1956), but that in sharp contrast to that case, it had no way of knowing that the testimony which was all it was hearing was hearsay."

He went on to say at Page 1000:

"In the Costello case there was excellent reason for limiting the presentation to three agents who summarized financial evidence, proof of which required 141 other witnesses and 368 exhibits at the trial, and the agents lack of direct knowledge must have been apparent. The statement in Mr. Justice Black's opinion, "An indictment returned by a legally constituted and unbiased grand jury, like information drawn by a prosecutor, if valid on its face, is enough to call for trial of the charge on the merits", 350 U.S. at 363, 76 S. Ct. 409, could never have been meant to validate anything like what happened here; on the contrary I am convinced that if Costello had presented facts like these, the Court would have dismissed the indictment on the ground stated by Mr. Justice Burton, that "to hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen! 350 U.S. at 364, 76 S. Ct. 409 (concurring opinion)."

In U.S. v. Umans, (CA2d) 368 F.2d 725, Judge Waterman stated at Page 730:

4-18-77 Alan Levine A45A appearing before Judge



"While we are not condemning the procedure used here before the grand jury, we think it not amiss for us to state the excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

In U.S. v. Arcuri, (E.D.N.Y.), 382 F. Supp. 347 (1968),

Judge Weinstein held at Page 349:

"The practice--as in the instant case--of relying on hearsay rather than upon the testimony of eye-witnesses is pernicious for two reasons. First, it habituates the grand jury to rely upon "evidence" which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examinations nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise judgment in refusing to indict in weak cases, where, technically, a prima facie case may have been made out. It is, moreover, unlikely to demand additional evidence."

The second reason the practice is undesirable is that it prevents the defendant from utilizing grand jury testimony in



cross-examining witnesses who will testify at the trial."

The Court ruled at Page 351:

"Accordingly, a timely motion to dismiss an indictment handed down after March 31 of 1968 will be granted without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was available for presentation to the grand jury. Cf. United States v. Tane, 329 F.2d 848, 853 (2d Cir. 1964) (motion to dismiss or quash an indictment because of the absence or incompetency of evidence before the Grand Jury is addressed to the discretion of the trial court)."

In the instant case, the grand jury did not, in essence, hear the testimony of the eye-witness. In posing leading questions to the witness, the Assistant United States Attorney became the witness. The grand jury heard "evidence" which appeared smooth, well integrated and consistent in all respects. When the Assistant United States Attorney speaks, respectful attention is paid to his words. When an Assistant United States Attorney puts a leading question to a witness, it carries with it the additional authority of his position. In effect, by posing exclusively leading questions, the prosecutor is implicitly telling the Grand Jurors that he vouches for the accuracy and truthfulness of the question. The witness' testimony merely affirms the "unsworn testimony" of the prosecutor.

The Grand Jurors do not make issue of his credibility. But one of the functions of the Grand Jury in order to find probable cause is to determine whether or not a witness is



credible. By hearing exclusively YES or NO from a witness, the Grand Jury cannot determine whether or not he is truthful. To find probable cause, the Grand Jury should hear from the witness' mouth his version of the events in question. The Grand Jury must determine after listening to the testimony of a witness whether his testimony is inconsistent or incomplete, or any other measure it uses to find probable cause.

These cases culminated in the case of U.S. v. Estepa, CA 2nd Cir., 471 F.2d 1132 (1972) where, except for the individual's name in the indictment, the only person who was in a position to inform the Grand Jury of just what occurred was not called and the sole witness before the Grand Jury was a City Policeman whose observations of defendants were both limited and remote and who, despite his extremely limited personal knowledge, spoke to the Grand Jury at length and in detail. The Grand Jurors were not aware of the witness' lack of personal knowledge.

The Court held that the nature of the presentation to the Grand Jury required a dismissal of the indictment.

There is some authority on this issue in the New York State Courts.

In People v. Rao, 386 N.Y.S.2d 448, P. 443, the Court stated in referring to the lower court decision:

"Mr. Justice Murtaugh's decision indicates that he found the evidence presented to the Grand Jury to be violative of the rules of evidence and highly prejudicial to the defendants. More particularly, he cited as incompetent or violative of the rules of evidence the fact that the undercover agents



testified against the defendants herein gave only "yes" or "no" answers to the leading questions by the Assistant Special Prosecutor,..."

Mr. Justice Murtaugh dismissed the indictment in the lower court.

After quoting verbatim from the transcript of the Grand Jury testimony and listing twenty-six leading questions, Justice Titone stated, in his dissenting opinion, Page 448:

"One of the fundamental rights that a defendant enjoys at trial is the use of prior statements or testimony of his accusers for purposes of impeachment on cross-examination. Because of this charade, the defendants' rights to the Grand Jury testimony of their accusers in cross-examination under People v. Rosaria, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881, has been rendered useless. The witness cannot be cross-examined in depth as to their versions of the occurrences, since their testimony in that regard amounts to little more than grunts and shrugs of the shoulders. Nor can the Assistant Special Prosecutor be cross-examined although for all intents and purposes he was an unsworn witness to the alleged happening."

He further stated:

"In my opinion, such total and purposeful violation of a most basic rule of evidence so taints the Grand Jury proceeding that the indictments should not be allowed to stand...The exclusive use of leading questions to elicit mere affirmances and denials from the prosecution's chief witness not only makes a mockery of the Grand Jury proceeding itself, but also, if these indictments were allowed to stand, would seriously jeopardize the defendant's right to a fair trial."

The defendant has suffered a denial of due process under the Fifth Amendment. Judge Haight denied the motion to dismiss the indictment in the District Court by deciding that the appellant



not suffered a denial of due process under the Fifth Amendment. See Page 9, Memorandum Decision and Order. He based his decision on Costello v. United States, supra, at Page 362:

"(N)either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries act." Page 9, Memorandum Decision and Order.

That decision does not go to the essence of the issue.

I have cited Federal authority where indictments have been dismissed if there is a total absence of competent or admissible evidence. I have cited Federal authority where indictments have been dismissed where hearsay was the only evidence presented to the grand jury. Judge Haight himself dismissed Count (2) of the instant indictment because of insufficient evidence.

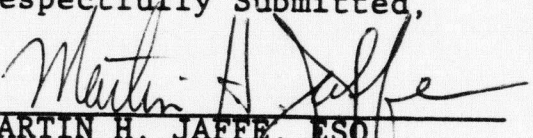
The exclusive use of leading questions by the government's sole witness in the grand jury rendered all the evidence before the grand jury incompetent.

Since all the evidence before the grand jury was incompetent, the evidence was insufficient for a finding of probable cause and therefore, the indictment should be dismissed.

CONCLUSION

By reason of the foregoing, the decision and order of the District Court denying the motion to dismiss the indictment should be reversed, and the indictment should be dismissed.

Respectfully Submitted,

  
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-v-

CHAKKRIE GITTIERIBOONGUE, a/k/a  
Chak

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF  
NEW YORK.

CASE NO. 76 Cr 933

JUDGE Haight

INDEX TO THE RECORD ON APPEAL

DOCUMENTS

Certified copy of docket entries

A-C

Certified copy of Indictment

1

Warrant of Removal in Indictment

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Letter of Magistrate Chancey ND of Ga  
to Raymond F Burghardt Clerk, SDNY

3

Notice of Appearance

4

Warrant of Removal

5

CJA Form 21 Copy 5

6

Transcript of proceedings dtd: 2/15/77

7

Transcript record of proceedings dtd: 12/16/77

8

Warrant of Arrest of Defendant

9

Judgments and Commitment

10

Memorandum decision and order of Judge Haight

11

Commitment and Return

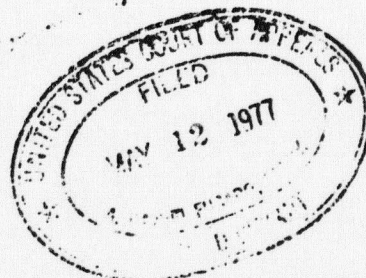
12

Notice of Appeal

13

CLEAR'S CERTIFICATE

14



77-1231



0208 1 0865  
a/k/a Chak  
10 01 76 0933 03  
No. of Defs \* 04  
Yr 1 Docket No 0  
U.S. MAG CASE NO.  
JUVENILE

U.S. TITLE/SECTION  
21:846  
21:812, 841(a)(1)  
& 841(b)(1)(A)  
OFFENSES CHARGED  
Consp. to viol. Fed. Narco. Laws  
Distr. & Poss. of Heroin, I.  
ORIGINAL COUNTS  
1  
2  
21:846  
21:812, 841(a)(1)  
& 841(b)(1)(A)  
Consp. to viol. Federal Narcotics Laws  
Distr. & Poss. of Heroin, I.  
SUPERSEDING COUNTS  
1  
2

SALE • RELEASE  
AMT Fugitive  
Denied Set Pers. Reco  
PSA  
\$ 000  
Date  
10% Deposit  
Surety Bond  
Collateral  
3rd Pity Cust  
On Government's Motion

SENTENCE  
Disposition of Charges  
2-23-77  
Convicted  
Accused  
Dismissed  
On Government's Motion

II. KEY DATES & INTERVALS

ARREST or  
U.S. Custody Began  
High Risk Date  
Summons Served  
First Appearance  
INDICTMENT  
Information  
10-1-76  
Indict Waived  
Superseding  
Indict Info  
12-6-76  
ARRAIGNMENT  
Trial Set For  
10-7-76  
G. Plea  
W/Drawn  
TRIAL  
Voor Dire  
Trial Began  
2-16-77  
Trial Ended  
2-23-77

MAGISTRATE  
DATE  
INITIAL/NO.  
INITIAL APPEARANCE DATE  
PRELIMINARY EXAMINATION OR  
REMOVAL HEARING  
WAIVED  
NOT WAIVED  
INTERVENING INDICTMENT  
Tape Number  
OUTCOME  
DISMISSED  
HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT  
HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Ass:

John P. Flannery, II  
791-0073

ATTORNEYS

Defense CJA Pet Waived Self Pet / Other PO CD

Show last names and suffix numbers of other defendants on same indictment/information.

01-Liu, 02-Fong, XXX 04-Kwok

DATE (DOCUMENT NO) PROCEEDINGS  
10-1-76 Filed indictment.....Palmieri, J.  
10-7-76 Deft. (not present). Court directs a not guilty plea be entered.  
B/W Ordered. Case assigned to Haight, J. for all purposes.  
.....Palmieri, J.  
12-6-76 Filed Superseding Indictment & referred to Haight, J.  
.....Motley, J.  
12-8-76 Filed letter & Copy of Order Appointing Counsel & Warrant of Removal of  
Indictment from the Northern District of Georgia, Bond on removal is set in the  
amt. of \$500,000 with surety. Signed by Allen L. Chauncey Jr. U.S. Magistrate.  
12-10-76 Filed Notice of Appearance by Howard H. Finger, %Finger Goldberg, Zinner, 404  
Ave. of the Americas, NYC - Tel. 594 4903.  
11-30-76 Filed Warrant of Removal on Indictment from The Northern District of Georgia.  
2-15-77 Filed Warrant of Removal on Indictment from the Northern District of Georgia.  
executed on 12-9-76. Dft. removed to the USM, SNY on 12-9-76.

EXCLUDABLE DELAY  
(a) (b) (c)



EXCLUDABLE DOCKET ENTRIES SHOW IN SECTION V ANY OCCURENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(n)

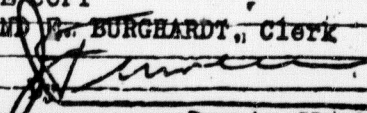
| IV. PROCEEDINGS (continued) |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | PAGE TWO                    |                               | V. EXCLUDABLE DELAY |             |  |  | LL                         |
|-----------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------|-------------------------------|---------------------|-------------|--|--|----------------------------|
| DATE                        | DOCUMENT NO.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Interval<br>Duration<br>(a) | Start Date<br>End Date<br>(b) | Code<br>(c)         | Days<br>(d) |  |  | Per<br>Page<br>Code<br>(e) |
| 2-16-77                     | M Filed Govts. Request to Charge.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                             |                               |                     |             |  |  |                            |
| 12-16-77                    | Dft. Chakkrip Gittisriboomgah, A/k/a "Chak" & Dft. Terradei<br>Kachench, present with atty. Stanley Zinner representing both<br>Dft. for this hearing. Both Dft.s plead not Guilty. Bail set at<br>\$100,000.00 for each Dft. Trial Date set for Feb. 16, 1977, all<br>motions not later than Jan 16, 1977.....Haight J. (rec'd 2-24-77)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                             |                               |                     |             |  |  |                            |
| 2-16-77                     | Dft. Chakkrip Gittisribongul P/W/A Martin Jaffe, Govt. by Alan<br>Levine, AUSA, Selection of 12 Jurors & 2 Alternates, all sworn<br>Case proceeds to trial. Interpreter Sheldon King, Sworn,<br>Language Thai.....Haight J. (rec'd 2-24-77)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                             |                               |                     |             |  |  |                            |
| 2-17-77                     | Trial Continues                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                             |                               |                     |             |  |  |                            |
| 2-18-77                     | Trial Continues                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                             |                               |                     |             |  |  |                            |
| 2-22-77                     | Trial Continues                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                             |                               |                     |             |  |  |                            |
| 2-23-77                     | Trial Continues & Concluded. @5:30PM. Jurors reach a verdict.<br>Dft. Gittisriboongul Guilty on charged on Cts. One & TWO.<br>Jurors Proceed. Dft. Remanded. Sentence Date for Gittisriboongul<br>is April 6, 77 @4:30 PM. P.S.I. Ordered.....Haight J. (rec'd<br>2-24-77)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                             |                               |                     |             |  |  |                            |
| 3/11/77                     | M Filed CJA 21 Copy 2 Approving payment to Sheldon M. King, 69-01<br>35th Avenue, Apt. 7F, Jackson Heights, NY as interpreter for<br>dft.....dtd. 3/4/77.....Haight J.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                             |                               |                     |             |  |  |                            |
| 3/11/77                     | / Filed CJA 21 Copy 5 Appointing Sheldon M. King, 69-01 35th Ave.<br>Apt. 7F, Jackson Heights NY as interpreter for dft.....dtd.<br>3/4/77.....Haight J.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                             |                               |                     |             |  |  |                            |
| 4-8-77                      | / Filed transcript of record of proceedings, dated 2-15-77                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                             |                               |                     |             |  |  |                            |
| 4-11-77                     | / Filed transcript of record of proceedings, dated 12-16-76                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                             |                               |                     |             |  |  |                            |
| 4-12-77                     | / Filed Govts. Memorandum on Sentencing.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                             |                               |                     |             |  |  |                            |
| 4-13-77                     | / Filed Warrant for Arrest of Dft.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                             |                               |                     |             |  |  |                            |
| 4-13-77                     | / Filed Judgment & Commitment (Atty. Martin Jaffe Present) The<br>dft. is hereby committed to the custody of the atty. gen. or<br>his authorized representative for imprisonment for a period<br>of EIGHT (8) YEARS in jail, & shall be come eligible for<br>parole at such time as the U.S. Parole Commission shall<br>determine pur. to T.18 US Code 4205(b)(2). To be followed by<br>a special parole term of THREE (3) YEARS, parole term is hereby<br>imposed in addition to the term of imprisonment pur. to T.21<br>U.S. Code 841 (b)(1)(A). It is order upon motion of dft., that<br>Count TWO(2) of the superseding indictment is dismissed. It<br>is ordered that a certified copy of this judgment & commitment<br>be mailed to the Immigration & Naturalization Service.....<br>.....Haight J. (mailed Certified Copy to Immigration & Natl)<br>Issued Commitment 4-14-77 |                             |                               |                     |             |  |  |                            |

(Cont'd)

| DATE | RECEIPT NUMBER | CD NUMBER |
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Dft. 3

| DATE                                                                                                                                                                                        | Page #3                                                                                                                                                                                                                                             | PROCEEDINGS |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 4-14-77                                                                                                                                                                                     | File Memorandum Order for the foregoing reasons, motions of dft. Gittisriboongul & Kachenchai to dismiss count one of the indictment are denied. Motion of dft. Gittisriboongul to dismiss count two of the indictment is granted....Haight J. (mm) |             |
| 4-18-77                                                                                                                                                                                     | Alan Levine AUSA appearing before Judge Haight mad a motion to Nolle Ind. #76 Cr.93. Orig. Ind. Judge & Court Granned application. Orig. Indictment dismissed as to dfts. Check Fong & Chakkrip Gittisriboongul.....Haight J.                       |             |
| APR 19 1977                                                                                                                                                                                 | Filed commitment & entered return, Dft. delivered to Warden, HCC, NY on 4-13-77                                                                                                                                                                     |             |
| 4-22-77                                                                                                                                                                                     | Filed Dft.s Notice of Appeal from Judgment & denial of motion to dismiss indictment. dtd. 4-13-77.(mailed notice)                                                                                                                                   |             |
| <p style="text-align: right;">A TRUE COPY<br/> RAYMOND E. BURGHARDT, Clerk<br/> <br/> Deputy Clerk</p> |                                                                                                                                                                                                                                                     |             |



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

76 CRIM. 0933

UNITED STATES OF AMERICA,

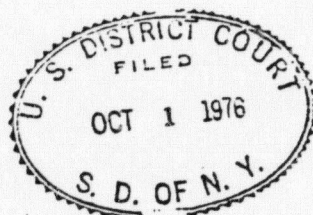
-v-

MILTON LIU, CHEK FONG,  
CHAKKRIP GITTISRIBOONGUL, a/k/a  
Chak, and CHAN KWOK,

Defendants .

INDICTMENT

76 Cr.



1. From on or about the 1st day of May, 1976  
and continuously thereafter up to and including the date of  
the filing of this indictment, in the Southern District of  
New York,

MILTON LIU, CHEK FONG,  
CHAKKRIP GITTISRIBOONGUL, a/k/a  
Chak, and CHAN KWOK,

**MICROFILM**

**OCT 04 1976**

the defendants and others to the Grand Jury unknown, unlaw-  
fully, intentionally and knowingly combined, conspired, confederate  
and agreed together and with each other to violate Sections 812,  
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said  
defendant unlawfully, intentionally and knowingly would distribute  
and possess with intent to distribute Schedule I ~~XXXXXX~~  
narcotic drug controlled substances the exact amount thereof  
being to the Grand Jury unknown in violation of Sections 812,  
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

1. On or about June 15, 1976, the defendant CHECK FONG gave another individual a free sample of heroin.
2. On or about June 15, 1976, the defendant CHECK FONG met with the defendant MILTON LIU near Allen Street, New York, New York.
3. On or about June 16, 1976, the defendant CHECK FONG sold approximately one ounce of heroin to an undercover agent for \$2,800.
4. On or about June 22, 1976, the defendant CHECK FONG met with an undercover agent at the Eastern Airlines Terminal at La Guardia Airport, Flushing, New York.
5. On or about June 30, 1976, the defendants CHECK FONG and CHAN KWOK flew from New York to Tampa, Florida.
6. On or about June 30, 1976, the defendants CHECK FONG, CHAN KWOK and CHAKKRIP GITTESRIBOONGUL, a/k/a Chak sold approximately six ounces of heroin to undercover agents for \$13,500 in Tampa, Florida.
7. On or about July 28, 1976, the defendant CHECK FONG gave an undercover agent a free sample of heroin in the vicinity of Allen Street, New York, New York.
8. On or about August 2, 1976, the defendants CHECK FONG and MILTON LIU met with an undercover agent in a parking lot on 92nd Street between 57th and 59th Avenues in Queens, New York.
9. On or about August 2, 1976, approximately six ounces of heroin was seized from defendants CHECK FONG and MILTON LIU in a parking lot on 92nd Street between 57th and 59th Avenues in Queens, New York.

(Title 21, United States Code, Section 846)



JPF,II:art

COUNT TWO

The Grand Jury further charges:

On or about the 16th day of June, 1976

in the Southern District of New York,

MILTON LIU, CHEK FONG, CHAKKRIP GITTISRIBOONGUL,  
a/k/a Chak, and CHAN KWOK

the defendants, unlawfully, wilfully and knowingly did  
distribute and possess with intent to distribute a  
Schedule I controlled substance, to wit,  
approximately one ounce of heroin.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(B).)

William R. Dawson  
Foreman

Robert B. Fiske Jr.  
ROBERT B. FISKE, JR.  
United States Attorney

7-18-77 Alan Levine MSA appearing before Judge  
Haight made a motion to Nolle Prosequi.  
76 Cr 933 orig. Judge & Court Granted  
application. Orig Indictment dismissed  
as to dfts. Check Long, Chakrap Sittirak  
Haight J. S



76 CRIM. 0933

Form No USA-33a-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

MILTON LIU, CHEK FONG,  
CHAKKRIP GITTISRIBOONGUL, a/k/a  
Chak, and CHAN KWOK,

Defendants.

INDICTMENT

(21, USC, §§ 812, 841(a)(1)  
and 841(b)(1)(A) and 21,  
USC, § 846)

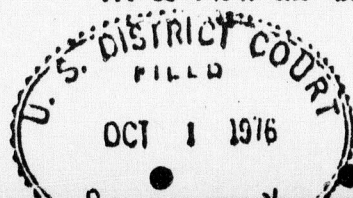
ROBERT B. FISKE, JR.

United States Attorney

A TRUE BILL

William R. Dawson  
Foreman

FPI-68-1-13-70-30M-4023



JUDGE HAIGH.

10-1-76 - Filed Indictment.

Palmerif.  
10-7-76- Deft. Milton Liu (atty Jack Lipoon) ~~Atty not present~~  
Deft. not present. Court directs a  
not guilty plea be entered. Bench warrant  
ordered, execution stayed 24 hours.  
Bail \$15,000. PAB continuing.  
Deft. Chek Fong (atty. Peter Keenan)  
pleads not guilty. Bail \$15,000. PAB  
Continued.

Deft. Chakkrip Gittisriboongul  
(not present) Court directs a not  
guilty plea be entered. Bench Warrant  
ordered.

Case assigned to Haigh  
for all purposes.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

(S) 76 CR 93

UNITED STATES OF AMERICA

- v -

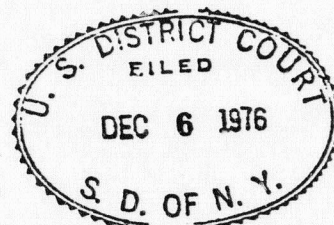
INDICTMENT

CHAKKRIP GITTISRIBOONGUL, a/k/a  
"Chakkrit Gittesriboongul", a/k/a  
"Chak",

S 76 Cr.

CHALI PRATEEPMANOWONG, a/k/a  
Charlie", a/k/a "Chan Kwok",  
CHECK FONG,  
MILTON LIU and  
TERRADEJ KACHENCHI,

Defendants.



COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of May, 1976 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, CHAKKRIP GITTISRIBOONGUL, a/k/a "Chakkrit Gittesriboongul", a/k/a "Chak", CHALI PRATEEPMANOWONG, a/k/a "Charlie", a/k/a "Chan Kwok", CHECK FONG, MILTON LIU and TERRADEJ KACHENCHI, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

MICROFILM

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1. On or about June 16, 1976, the defendant CHECK FONG sold approximately one ounce of heroin to an undercover agent for \$2,800.

2. On or about June 22, 1976, the defendant CHECK FONG met with CHALI PRATEEPMANOWONG, a/k/a "Charlie", a/k/a "Chan Kwok", at the Eastern Airlines Terminal at La Guardia Airport, Flushing, New York.

3. On or about June 30, 1976, the defendants CHECK FONG and CHALI PRATEEPMANOWONG, a/k/a "Charlie", a/k/a "Chan Kwok", flew from New York to Tampa, Florida.

4. On or about June 30, 1976, the defendant TEERADEJ KACHENCHI delivered approximately six ounces of heroin to the defendants CHECK FONG, CHALI PRATEEPMANOWONG, a/k/a "Charlie", a/k/a "Chan Kwok" and CHAKKRIP GITTISRIBOONGUL, a/k/a "Chakkrit Gittesriboongul", a/k/a "Chak", in Tampa, Florida.

5. On or about June 30, 1976 the defendants CHECK FONG, CHALI PRATEEPMANOWONG, a/k/a "Charlie", a/k/a "Chan Kwok", and CHAKKRIP GITTISRIBOONGUL, a/k/a "Chakkrit Gittesriboongul", a/k/a "Chak", sold approximately six ounces of heroin to undercover agents for \$13,500 in Tampa, Florida.

6. On or about July 28, 1976, the defendant CHECK FONG gave an undercover agent a free sample of heroin in the vicinity of Allen Street, New York, New York.

7. On or about August 2, 1976, defendants CHECK FONG and MILTON LIU possessed and offered for sale to an undercover agent approximately six ounces of heroin in a parking lot on 92nd Street between 57th and 59th Avenues in Queens, New York.

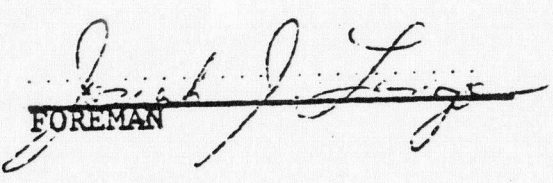
(Title 21, United States Code, Section 846.)

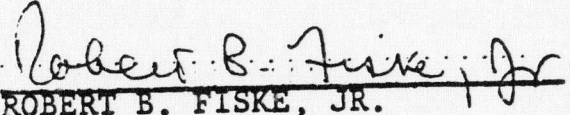
COUNT TWO

The Grand Jury further charges:

On or about the 16th day of June, 1976 in the Southern District of New York, CHAKKRIP GITTISRIBOONGUL, a/k/a "Chakkrit Gittesriboongul", a/k/a "Chak", CHALI PRATEEPMANOWONG, a/k/a "Charlie", a/k/a "Chan Kwok", CHECK FONG and MILTON LIU, the defendants, unlawfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately one ounce of heroin.

(Title 21 United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

  
FOREMAN

  
ROBERT B. FISKE, JR.  
United States Attorney



Geo. de la Cruz at the Station, Terminal Island, Cal. Terminal. 90731.

Thur. 11. 8. 8

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v.

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Count One, Count Two (2) 1/2

Dismissed at time of sentence. Sentencing is referred to Judge Ferguson, Central Dist. of Los Angeles, California pursuant to Rule 20, F.R. Crim P. as per order of the Court 2/22/77. Deft. Continued in Custody. Haight, J.

ROFII

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FEB. 16<sup>th</sup> 1977 Deft. Chakkap Gittisribongkuk P/A Martin Taffe, Deft. TERRADET KACHENCHI P/A Stanley ZINNER, Gov't by ALAN LEVINE, AUSA, Selection of 12 jurors and 2 alternates, all sworn, case proceeds to trial. Interpreter Sheldon King, Sworn, Language, Thai.

FEB 17 1977 TRIAL CONTINUES.

FEB 18 1977 TRIAL CONTINUES.

FEB 22 1977 TRIAL CONTINUES. All Sides Rest.

FEB 23 1977 TRIAL CONTINUES and concluded. at 5:36 pm.

Jurors reach a verdict. Deft. Gittisribongkuk Guilty as charged on Cts One and Two. Deft. Kachenchu, Guilty on Count One as charged. Jurors sworn. Both defts remanded. Sentence date for Gittisribongkuk is April 6, 77 at 4:30 pm. P.R. ordered. For Deft. Kachenchu, April 7, 77, at 4:30 pm. P.R. ordered. Haight, J.

April 12, 1977. Deft. Cheek Long, P/A Peter Sherman, Gov't by ALAN LEVINE, AUSA. Sentence: 18 months in jail followed by 3 years Special Parole. He shall become eligible for parole at 18 months. The U.S. Parole Commission shall

Long-Continued:

Count 2 dismissed. Present bail conditions are to remain in effect. Deft. to surrender May 31, 1977 at 10: AM.

Haight, J.

April 13, 1977 Deft. Chakkap Gittisribongkuk AKA "CHAK", P/A MARTIN TAFFE, Gov't by ALAN LEVINE, Interpreter Sheldon King, Sworn.

Sentence: 8 yrs in jail, to be followed by 3 yrs of Special Parole, U.S. Commission of Parole to determine when he is eligible for Parole. Count 2 dismissed by the Court upon motion of Deft. Ordered that a certified copy of this judgment and commitment be MAILED to the Immigration and Naturalization Service. Haight, J.

April 14, 1977 Deft. TERRADET KACHENCHI, P/A Stanley ZINNER, Gov't by ALAN LEVINE, AUSA, Interpreter, Sheldon King, Sworn. Sentence: Six yrs in jail, eligible for Parole determined by the U.S. Parole Commission. In addition to the jail



(S) 76 CR 933

Form No. USA-33a-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CHAKKRIP GITTISRIKONGUL, A/K/A  
"CHAK", CHALI PRATERMANOWONG,  
A/K/A "CHAN KWOK", CHUCK PONG,  
WILTON LIU and TERRADET KACHENCHAI,

Defendants.

INDICTMENT

s. 76 cr.

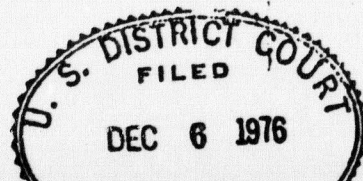
(In violation of Title 21,  
U.S.C. 15612, 641(a)(1),  
641(b)(1)(A) and 641.)

ROBERT M. FIDELL, JR.

United States Attorney.

A TRUE BILL

Joseph J. Long  
Foreman.



BEST COPY AVAILABLE

DEC 9 - 1976 Deft. Check SHEEM Fong present w/A  
PETER SHERMAN, Gov't by THOMAS SEAR, AUSA.  
Deft. ADVISED OF ALL HIS RIGHTS by the Court, Deft.  
pleads Guilty to Count ONE (1) of indictment #  
(S) 76 CR 933 and N/G to Count Two (2) OF SAID  
indictment. Court accepts plea. PSK ordered.  
Bail conditions continue, Sentence date in JAN.  
28, 1977 at 2 PM. Haight, J.  
minutes of hearing of Plea to be served by Court.

DEC 16 1976 Deft. Chali Pratermanowong A/K/A  
"CHARLIE", A/K/A CHAN KWOK, present with Atty,  
SIDNEY MEYERS, Gov't by THOMAS SEAR, AUSA. Deft.  
Pleads Not Guilty. Deft. here on writ from California.  
Bail set at \$100,000.00 at all future hearings and  
trial. Deft. counsel request a Thai Interpreter  
be present under CJA arrangements. Trial date set  
for Feb. 16, 1977, all motions not later than Jan. 16, 77.  
Haight, J.

DEC 16 1976 Deft. CHAKKRIP GITTISRIKONGUL, A/K/A  
"CHAK" and Deft. TERRADET KACHENCHAI, present  
with Atty. STANLEY ZINNER, representing both  
Deft. for this hearing. Both Defts plead Not Guilty.  
Bail set at \$100,000.00 for each Deft. Trial date  
set for Feb. 16, 1977, all motions not later than Jan. 16, 77.  
Haight, J.



Tl

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AFTERNOON SESSION

3

(2:00 p.m.)

4

CHARGE OF THE COURT

5

(Haight, J.)

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THE COURT: Ladies and gentlemen, it is time for me to give you my instructions on the law and then the case will be in your hands for your deliberation and determination of the facts of the case.

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I want to say first that I am grateful to you for your prompt and faithful attendance at this trial and for the close attention with which you obviously followed the evidence and the remarks of counsel.

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There are wiser and infinitely more experienced judges than I in this court who feel that it is not appropriate to thank jurors for their duties because they are performing an act of citizenship and one should not be thanked for doing his or her duty as a citizen of the republic. There is much to be said for that, and yet I perceive a difference in manners of performing one's duties of citizenship. There is a difference between performing those duties willingly and grudgingly. There is a differ-



1 rga2

2 ence between being on time and not being on time,  
3 and when I say that I exempt from any blame our juror  
4 from Poughkeepsie, who I am prepared to nominate for  
5 the commuting award of the Southern District this  
6 year.

7 There is a difference between following  
8 the evidence carefully and the remarks of counsel care-  
9 fully and being inattentive.

10 I think you have all discharged your duties  
11 as jurors in this case well and truly and I am grateful  
12 to you for it and don't hesitate to say so. I am  
13 sure you will go on performing those duties in  
14 accordance with your oaths once the case is in your  
15 hands.

16 I said at the beginning of the trial that  
17 we were engaged in a partnership, you and I, performing  
18 different but complementary roles. You are the  
19 finders of the fact, but you must find those facts in  
20 accordance with my instructions on the law. This  
21 dual function between jurors and judges has been a  
22 part of our American system for 200 years and it comes  
23 to us from Great Britain, which is our ancestor country  
24 as far as our legal systems are concerned, and it has  
25 been a part of the British system for many centuries.

1 I think that it works well and I suggest to you this dual  
2 responsibility of jurors finding facts, but finding them  
3 within the context of the judge's instructions on the law  
4 is to protect us all from two possible tyrannies.  
5

6 The first is a tyranny of judges, which could  
7 well arise if judges acted both as finders of the fact and  
8 as judges of the law. That would lead to a risk that judges,  
9 either being too close to the Crown or to some other  
10 of government, or because of pride of position or because of  
11 remoteness from what is going on in the community and the  
12 neighborhood might not be able to fairly administer justice,  
13 and so it is a part of our system that any individual con-  
14 fronted with a possible loss of liberty or property is  
15 entitled to have the facts in the case found by a jury  
16 of impartial fellow citizens.

17 The other possible tyranny that I can see is a  
18 tyranny of the people, which could arise if the jurors,  
19 in finding the facts, were at liberty to depart from  
20 and to disregard the court's instructions as to the law.  
21 Because if such a situation or a system was permitted,  
22 then we would all be prey, perhaps, to the passions of the  
23 moment and we would not have running through all of our cases  
24 the certitude and the stability which rules of law give  
25 to us.



1                   So it follows that while, as has been said  
2  
3                   to you frequently during this trial, you are the sole  
4  
5                   judges of the facts, you must find those facts in accordance  
6  
7                   with the instructions on the law that I am about to give you.  
8  
9                   You must follow those instructions; you must not substitute  
10                  your own views, if any, as to what the law should be.  
11  
12                  If we each do our parts, you and I, there will be that  
13  
14                  coming together of complementary functions which lies at  
15  
16                  the heart of our system of criminal justice.

17                         I am going to charge you on the law now.  
18  
19                         I would prefer to simply stand here and speak to you on  
20  
21                         the law of the case in a relatively informal manner as  
22  
23                         I have been doing, but the charge on the law is a  
24  
25                         serious and important part of the trial.  
26  
27                         It is somewhat complex and it lies beyond my own poor  
28  
29                         powers to remember it all with a sufficient confidence  
30  
31                         that I will get it all right for you.     So to a certain  
32  
33                         extent I am going to read it to you and that may seem a  
34  
35                         little impersonal.     I apologize for that.  
36  
37                         I don't intend it to be.     I simply want to make sure  
38  
39                         that I give you the correct and proper instructions of  
40  
41                         the law.

1 rga5

2 That is what I will now turn to.

3 We are, as I have said, now at the stage  
4 of the trial where you will soon undertake your  
5 final function as jurors and here you do indeed  
6 perform one of the most sacred obligations of citizen-  
7 ship. That is, acting as ministers of justice.  
8 You are to discharge this final duty in an attitude  
9 of complete fairness and impartiality and, as was empha-  
10 sized by me when you were selected as jurors, without  
11 bias or prejudice for or against the government or  
12 either defendant as parties to this controversy.

13 The fact that the trial was of compara-  
14 tively short duration does not mean that it is not  
15 important. It is important to the defendants who  
16 are charged with serious crimes. It is equally im-  
17 portant to the government for the enforcement of  
18 criminal law is a matter of prime concern to the  
19 community and to its welfare. Let me add this.  
20 The fact that the government is a party entitles it  
21 to no greater consideration than that accorded to any  
22 other party to a litigation. By the same token, the  
23 government is entitled to no less consideration.  
24 All parties, government, corporations and individuals  
25 alike, stand as equals before the bar of justice.



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2                   Your final role is to decide and pass upon  
3           the fact issues in the case.     You are the sole  
4           and exclusive judges of the facts.     You determine  
5           the weight of the evidence, you appraise the credi-  
6           bility of the witnesses, you draw the reasonable infer-  
7           ences from the evidence and you resolve such conflicts  
8           as there may be in the evidence.

9                   I shall later refer to how you determine  
10          the credibility of witnesses.     My final function  
11          is to instruct you as to the law and it is your duty  
12          to accept these instructions as to the law and to  
13          apply them to the facts as you may find them.

14                   With respect to any fact matter, it is your  
15          recollection and yours alone that governs.     As I have  
16          already told you, anything that counsel, either for  
17          the government or defense, may have said with respect  
18          to matters in evidence, whether during the trial in  
19          a question, in argument or in summation, is not to  
20          be substituted for your own recollection of the  
21          evidence.     So, too, anything the court may have  
22          said during the trial or may refer to during the  
23          course of these instructions as to any fact matter  
24          in evidence is not to be taken in place of your own  
25          recollection.

1 rga7

2 In aid of your recollection you may at any  
3 time during your deliberations request the testimony  
4 be read back to you, or ask to examine certain exhi-  
5 bits. Furthermore, at the conclusion of these  
6 instructions I shall give you each a copy of the indict-  
7 ment for your convenient reference during your delibera-  
8 tions.

9 Before we consider the precise charges against  
10 Chakkrip Gittisriboongul, also referred to throughout  
11 these proceedings as Chakkrit, and Terradej Kachenchi,  
12 also known as Daeng, the defendants on trial before  
13 you, some preliminary matters should be noted.

14 Count 1, the conspiracy count of the indict-  
15 ment, charges that the defendants Gittisriboongul and  
16 Kachenchi conspired with each other, or with one or  
17 more of certain other persons named therein, to  
18 violate the federal drug control laws.

19 Count 2, the substantive count, charges  
20 that Gittisriboongul and several other persons,  
21 not including Kachenchi, committed the crime referred  
22 to therein, namely, the alleged sale of a certain  
23 quantity of heroin.

24 The indictment uses the word "count."  
25 Counsel have used that word in their arguments. I



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2 have used it in my words to you today. It is a techni-  
3 cal lawyer's word. The word "count" in a criminal  
4 indictment means charge, or accusation. A count in  
5 an indictment is, in effect, an accusation that the  
6 defendant has violated the law in a particular way.  
7 If an indictment contains more than one accusation,  
8 then it contains more than one count.

9 In the present indictment Mr. Gittisri-  
10 boongul and Mr. Kachenchi are both charged in the  
11 first of the two counts, Mr. Gittisriboongul is charged  
12 alone in the second count.

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2                   On this trial you are concerned only with  
3                   the guilt or innocence of Mr. Gittisriboongul and Mr.  
4                   Kachenchi.

5                   The fact that other persons named in the indict-  
6                   ment are not on trial with these defendants is not to  
7                   enter into your deliberations, nor may you draw any infer-  
8                   ence for or against them, or against the Government, by  
9                   reason of that fact.

10                  You are aware from his testimony that Chali  
11                  Preteepmanowong, also known as "Kwok" has pleaded guilty  
12                  to the conspiracy count, to the first count of the indict-  
13                  ment.

14                  That was his personal plea.

15                  That fact may not be considered against the  
16                  defendants here on trial, or either of them, nor may any  
17                  adverse inference be drawn against them by reason of that  
18                  plea.

19                  Guilt is personal.       The guilt or innocence  
20                  of each of the defendants here on trial must be determined  
21                  solely upon the evidence presented against them, or the  
22                  lack of evidence.

23                  The charges against them and each of them stand  
24                  or fall upon the proof or lack of proof as to them, and  
25                  not as to any co-defendant or anyone else.       That is a



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2       : important principle of our criminal law.       I shall  
3 return to it later in these instructions.

4               There are certain principles of law which apply  
5 to every criminal case, and to which I made reference and  
6 emphasized at the time of your selection as jurors.  
7 I repeat them now.

8               The indictment is merely an accusation, a  
9 charge.

10              It is no evidence or proof of a defendant's  
11 guilt.

12              No weight whatsoever is to be given to the fact  
13 that an indictment has been returned against the defendants.

14              They have pleaded not guilty.

15              Thus, the Government has the burden of proving  
16 the charges against them beyond a reasonable doubt.

17              The defendants do not have to prove their  
18 innocence.       On the contrary, they are presumed to be  
19 innocent of the accusations contained in the indictment.

20              This presumption of innocence was in their  
21 favor at the start of the trial, it continued in their  
22 favor throughout the entire trial, it is in their favor  
23 even as I instruct you now, and it remains in their favor  
24 during the course of your deliberations in the jury room.

25              It is removed only if and when you are satis-

1 mks

2 fied that the Government has sustained its burden of  
3 proving the guilt of the defendant beyond a reasonable  
4 doubt.

5 The question that naturally arises is, what  
6 is a reasonable doubt?

7 The words almost define themselves -- that there  
8 is a doubt founded in reason and arising out of the  
9 evidence in the case, or the lack of evidence.

10 It is a doubt which a reasonable person has,  
11 after carefully weighing all the evidence.

12 Reasonable doubt is a doubt which appeals to  
13 your reason, your judgment, your common sense, and your  
14 experience.

15 It is not caprice, whim, speculation, conjecture  
16 or suspicion.

17 It is not an excuse to avoid performance of  
18 an unpleasant duty.

19 It is not sympathy for a defendant.

20 If, after a fair and impartial consideration  
21 of all the evidence, you can, candidly and honestly, say  
22 you are not satisfied of the guilt or a particular  
23 defendant, that you do not have an abiding conviction  
24 of a defendant's guilt -- in sum, if you have such a doubt  
25 as would cause you, as prudent persons, to hesitate before



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2 acting in matters of importance to yourselves, then you  
3 have a reasonable doubt, and in that circumstance it is  
4 your duty to acquit the defendant under consideration.

5 On the other hand, if after such a fair and  
6 impartial consideration of all the evidence you can,  
7 candidly and honestly, say you do have an abiding conviction  
8 of a defendant's guilt, such a conviction as you would  
9 be willing to act upon in important and weighty matters  
10 in the personal affairs of your own life, then you have no  
11 reasonable doubt, and in that circumstance it is your duty  
12 to convict.

13 One final word on this subject.

14 Reasonable doubt does not mean a positive  
15 certainty or beyond all possible doubt. If that were the  
16 rule, few persons, however guilty they might be, would  
17 be convicted.

18 It is practically impossible for a person to  
19 be absolutely and completely convinced of any controverted  
20 fact, which by its nature is not susceptible of mathematical  
21 certainty.

22 In consequence, the law in a criminal case  
23 is that it is sufficient if the guilt of a defendant is  
24 established beyond a reasonable doubt -- not beyond all  
25 possible doubt.

1 mks  
2 I turn now to the law that is the subject  
3 of the indictment, and the difference between the two counts  
4 in the indictment.

5 The counts in the indictment charge violation  
6 of the Drug Abuse, Prevention and Control Act.

7 This law was enacted by Congress in an effort  
8 to combat the illegal importation, distribution, possession  
9 and improper use of various drugs, which have a substantial  
10 and detrimental effect on the health and general welfare  
11 of the American people.

12 Under that Act, various drugs are classified  
13 as "controlled substances", and are listed in schedules.

14 These schedules include narcotic drugs, as well  
15 as other drugs.

16 Heroin, which is a narcotic drug, is included  
17 in Schedule 1 as a controlled substance.

18 The first count of the indictment charges  
19 Mr. Gittisriboongul and Mr. Kachenchi, together with other  
20 named individuals, as being engaged in a conspiracy to  
21 violate the Drug Control Law.

22 I shall refer to the first count of the indict-  
23 ment as the conspiracy count.

24 The second count, to which I shall refer as  
25 the substantive count, charges Mr. Gittisriboongul and the



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other individuals named therein, with the commission of an actual violation of the law, which makes it unlawful for one to distribute or to possess with intent to distribute a controlled drug.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime, which is the objective of the conspiracy.

The essence of the crime of conspiracy is an agreement or undersanding to violate other laws.

A conspiracy, which sometimes is referred to as a partnership in crime, because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single individual.

Group association or organized activity renders detection more difficult than in the instance of a single or lone wrongdoer.

Thus, because of the special dangers to the community of conspiracies to distribute controlled drugs, Congress enacted as part of the Drug Control Law a provision that a conspiracy to violate the Act constitutes a separate crime, in addition to the substantive offense.

Count 1 of this indictment is based upon a section of the law which provides, in pertinent part:

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"Any person who . . . conspires to commit any offense" in violation of the Drug Control Act is guilty of a crime, and in the present case, both Mr. Gittisriboongul and Mr. Kachenchi are accused of conspiring to violate the Drug Control Act.

The actual violation of the Act, which is charged in Count 2 of the indictment, the substantive crime, is based upon another part of the Act which, in pertinent part, reads:

"It shall be unlawful for any person \* \* \* knowingly or intentionally \* \* \* to \* \* \* distribute \* \* \* or possess with intent to \* \* \* distribute \* \* \* a controlled substance \* \* \*."

In the present case only Mr. Gittisriboongul, as between these two defendants, is charged with the actual violation of the Drug Control Act. That charge appears in Count 2 of the indictment. It relates to the alleged sale of one ounce of heroin in New York on or about June 16, 1976.

Another law which comes into play in this case is known as the Aiding and Abetting Law, which I shall discuss in detail later as it relates to the substantive count.

Suffice it to say for present purposes that



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1 this provision makes it a crime for one to aid and abet  
2 another in the commission of a crime.  
3

4 Against this background of the applicable law,  
5 we turn to a consideration of the specific counts of the  
6 indictment.

7 Since the essential elements which the Govern-  
8 ment must prove in order to sustain the respective charges  
9 are different for each count, we shall consider each count  
10 separately.

11 Thus, as to the first of conspiracy count,  
12 the grand jury charges as follows:

13 "1. From on or about the 1st day of May,  
14 1976 and continuously thereafter up to and including  
15 the date of the filing of this indictment, in the  
16 Southern District of New York, and elsewhere,  
17 Chakkrip Gittisriboongul, a/k/a 'Chakkrit  
18 Gittesriboongul', a/k/a 'Chak', Chali Prateepmanowong,  
19 a/k/a 'Charlie', a/k/a 'Chan Kwok', Check Fong,  
20 Milton Liu and Terradej Kachenchi, the defendants  
21 and others to the Grand jury unknown, unlawfully,  
22 intentionally and knowingly combined, conspired,  
23 confederated and agreed together and with each  
24 other to violate" certain sections of the Drug  
25 Control Law.



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2. The grand jury also charges that

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"it was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the grand jury unknown" in violation of certain sections of the Drug Control Act.

I say to you again that the fact that the charges appear in the indictment and that I have read the indictment to you in the course of these instructions does not in any way constitute evidence of guilt.

In order to convict either of these two defendants on trial the government must prove beyond a reasonable doubt the following essential elements with respect to conspiracy:

1. The existence of the conspiracy charged in the indictment; that is, an agreement or understanding to violate those provisions of law which prohibit the distribution or possession with intent to distribute heroin;

2. That the defendant under consideration knowingly associated himself with and participated in that conspiracy; and,



1 rga2

2 3. That at least one of the conspira-  
3 tors knowingly committed at least one overt act in  
4 furtherance of the conspiracy within the Southern  
5 District of New York.

6 Within the context of this particular case  
7 I charge you that the Borough of Manhattan falls  
8 within the Southern District of New York.

9 Now let us consider under the first element  
10 what is a conspiracy. The idea of a conspiracy is  
11 simple. A conspiracy is a combination, an agreement  
12 or understanding of two or more persons to accomplish  
13 by concerted action a criminal or unlawful purpose, in  
14 this instance to distribute or possess with intent  
15 to distribute a controlled substance, to wit,  
16 heroin.

17 The gist of the crime is the unlawful  
18 combination or agreement to violate the law. The  
19 success or failure of the conspiracy is immaterial to  
20 the question of the guilt or innocence of a conspira-  
21 tor.

22 To establish a conspiracy the government  
23 is not required to show that two or more persons  
24 sat around a table and entered into a solemn pact orally  
25 or in writing stating that they have formed a conspiracy

1 rga3

2 to violate the law, or the details or the means by  
3 which its object was to be achieved. Common sense  
4 will tell you that when persons in fact undertake to  
5 enter into a criminal conspiracy much is left to the  
6 unexpressed understanding. It is rare that a con-  
7 spiracy can be proved by direct evidence. What the  
8 evidence must show in order to establish that a  
9 conspiracy existed is that two or more persons in  
10 some way or manner, through any contrivance, impliedly  
11 or tacitly, came to a common understanding to violate  
12 the law or to accomplish an unlawful plan.

13 In determining whether there has been an  
14 unlawful agreement you may judge acts and conduct of  
15 the alleged co-conspirators which were done to carry  
16 out an apparent criminal purpose. The adage "actions  
17 speak louder than words" may be applicable here.  
18 Usually the only evidence available is that of discon-  
19 nected acts and conduct on the part of the alleged in-  
20 dividual co-conspirators, which acts and conduct, how-  
21 ever, when taken together in connection with each  
22 other and considered as a whole, permit an inference  
23 that a conspiracy existed as conclusively as by  
24 direct proof.

25 You must first determine whether or not



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2       the proof establishes the existence of the con-  
3       spiracy as charged in the indictment.     In deciding  
4       this first element you must consider all the elements  
5       which have been admitted with respect to the conduct,  
6       acts and declarations of each alleged co-conspirator  
7       and such inferences as may be reasonably drawn there-  
8       from.

9               It is sufficient to establish the existence  
10       of the conspiracy if, from the proof of all the rele-  
11       vant facts and circumstances, you find beyond a reason-  
12       able doubt, as I have defined that phrase to you,  
13       that the minds of at least two alleged co-conspirators  
14       met in an understanding way to accomplish by the means  
15       alleged one or more objects of the conspiracy as  
16       charged in the indictment.     If you do conclude that  
17       the charged conspiracy did exist, you must next deter-  
18       mine the second element, namely, whether the defendants  
19       on trial, or either one of them, was a member of the  
20       conspiracy.

21               Their participation in the conspiracy,  
22       if you find that one did exist, must be established  
23       by the independent evidence of their own acts,  
24       statements and conduct, as well as those of the other  
25       alleged co-conspirators, and the reasonable infer-



1 rga5

2 ences to be drawn therefrom.

3 To find either of these defendants in  
4 this case guilty of conspiracy you must find beyond  
5 a reasonable doubt that, aware of the existence of the  
6 conspiracy and of its purposes, he was a willing  
7 participant with the intent to advance its purposes.

8 To become a member of a conspiracy a  
9 particular defendant need not know all the other mem-  
10 bers, their respective roles in, nor all the details  
11 of the conspiracy. Each member may perform separate  
12 and distinct acts and at different times. Some conspira-  
13 tors may play major roles, while others may play minor  
14 roles. In a word, it is not required that a person  
15 be a member of the conspiracy from its very start.  
16 A single act may be enough to draw one within the  
17 ambit of the conspiracy provided the proof establishes  
18 that, aware of the conspiracy, he knowingly  
19 associated himself with it and participated therein.

20 However, mere knowledge or acquiescence  
21 in the object or the purpose of the conspiracy is not  
22 sufficient. More is required. This something  
23 more is generally described as a stake in the venture  
24 or a stake in its outcome. While a financial stake  
25 in a venture is not essential, if you do find that a



1 rga6

2 particular defendant had such an interest, this is a  
3 factor that may be considered by you in deciding  
4 whether or not a defendant was a member of the con-  
5 spiracy, if you find that a conspiracy existed.

6 One may join an existing conspiracy at any  
7 point during its progress, and however limited his role,  
8 if he in fact joined it and participated in it, then  
9 he is responsible for all that had been done, even before  
10 he joined and that may be done thereafter in further-  
11 ance of its objects.

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A conspiracy has sometimes been described as a partnership in criminal purposes.

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Simply stated, by becoming a partner an individual assumes all the previous liabilities of the partnership.

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Once you are satisfied beyond a reasonable doubt that a conspiracy existed, and that the defendants on trial, or either one of them, became a member, then the acts and declarations of any other person found to be a member, made during the pendency of the conspiracy and in furtherance of its objectives, are considered the acts and declarations of the defendant.

Thus, if you find a conspiracy as charged existed, of which the witness, Mr. Prateepmanowong, was a member, then the distribution of heroin or possession of heroin with intent to distribute, or any sale of heroin made by Mr. Prateepmanowong, or any discussion or act of his to further or arrange such a distribution or sale would be binding upon Mr. Gittisriboongul or Mr. Kachenchai, the defendants on trial, if you further find that they, or either of them was a member of the conspiracy.

This would be so, even if such acts were committed when the defendants on trial were not present.

Similarly, if you find that a sale of heroin



1 ks2

2 was made to Special Agent Toal, the undercover agent,  
3 at the location charged in the indictment, and you further  
4 find a conspiracy existed to effect the sale, of which  
5 either Mr. Gittisriboongul or Mr. Kachenchi were members,  
6 the sale would be binding upon them even if they were not  
7 present, assuming again that you found the existence of a  
8 conspiracy and the participation of the particular  
9 defendant in that conspiracy.

10 Summing it up in a simple way, if in fact  
11 there was a partnership in crime, each partner acts and  
12 speaks for the other in the furtherance of the partnership  
13 business, whether or not the other was present.

14 The existence of a conspiracy and one's member-  
15 ship therein may be established by direct evidence or  
16 circumstantial evidence.

17 Conspiracies are rarely susceptible of proof  
18 by direct evidence.

19 Usually they are established as a matter of  
20 reasonable inference based upon circumstantial evidence.

21 Direct evicence is where a witness testifies  
22 to what he saw, heard and observed, and what he knows of  
23 his own knowledge, that which comes to him by virtue of  
24 his senses.

25 Circumstantial evidence is where facts are

1 ks3

2 established from which, in terms of common experience,  
3 one may logically infer other facts that are sought to be  
4 established.

5 Let me give you a popular example of circum-  
6 stantial evidence that judges frequently use.

7 If during one of the days of this trial you  
8 came into this courtroom, and when you came in it was a  
9 beautiful day outside but the blinds were drawn and you  
10 could not see what the weather was like outside, and after  
11 working for two or three hours the door of the courtroom  
12 opens up and in comes a gentleman wearing a raincoat which  
13 is dripping with water and shaking out an umbrella which  
14 is dripping with water, well, you have not been able to  
15 see what is happening outside with the weather, but from  
16 that particular observation you could, if you wished,  
17 draw a reasonable inference as to what was happening to  
18 the weather outside since you came in.

19 That is an example of circumstantial evidence.

20 Circumstantial evidence, if believed, is of no  
21 less value than direct evidence, for in either case,  
22 whether circumstantial or direct evidence is being offered  
23 for your consideration, you must be convinced beyond a  
24 reasonable doubt as to the guilt of a defendant.

25 In this case the Government relies upon both



1 ks4

2 direct and circumstantial evidence.

3 Whether a particular defendant knowingly and  
4 intentionally participated in the claimed conspiracy  
5 presents issues of fact. Clearly these issues concern  
6 what is in one's mind.

7 Medical science has not yet devised an  
8 instrument whereby we can go back to the time of the  
9 occurrence of events and determine what then was a person's  
10 intent or knowledge.

11 These issues must of necessity be determined  
12 from one's acts, his conduct, surrounding circumstances,  
13 and such inferences as may reasonably be drawn therefrom.

14 I wish to add one word of caution. Mere  
15 association of a defendant with an alleged conspirator or  
16 conspirators does not establish his participation in a  
17 conspiracy, if you find that a conspiracy did in fact  
18 exist.

19 So, too, mere knowledge by a particular  
20 defendant of a conspiracy or any illegal act on the part  
21 of other alleged co-conspirators is not sufficient to  
22 establish a particular defendant's membership in the con-  
23 spiracy.

24 Before the inference may be drawn that a  
25 defendant was a member of a conspiracy, you must, as I

2 have already instructed you, be satisfied from the evidence  
3 presented by the Government that this particular defendant  
4 knowingly associated himself with the conspiracy, with  
5 the specific intent to aid the accomplishment of its  
6 unlawful purposes.

7 It is important to remember that in deciding  
8 this question of association and participation you must  
9 look only at words and deeds of the defendant whom you are  
10 considering in deciding if he has been shown by the evidence  
11 to have been a member of the conspiracy. The actions of  
12 others do not determine whether a particular individual is  
13 a participant.

14 The words and deeds of each particular  
15 defendant that you are considering, and the legitimate  
16 inferences therefrom alone will determine whether he is a  
17 member of the conspiracy.

18 Proof of a particular individual's participation  
19 must be substantial and not slight.

20 Thus, in considering whether a particular  
21 defendant was a member of the conspiracy you must do so  
22 independently of the acts of the other alleged co-conspirators.

23 In other words, whether or not Mr. Gittisriboongul  
24 or Mr. Kachenchai was a member of the conspiracy or joined  
25



1 the conspiracy must be determined on the evidence which  
2 you accept as to his own actions, his own conduct, his  
3 own statements and declarations, if any, his own connection  
4 with the acts in aiding all the other alleged conspirators,  
5 and not on the independent acts and statements of anyone  
6 else.  
7

8 You are the sole judges of the evidence on  
9 those points.

10 I have already mentioned that the third  
11 essential element of the crime of conspiracy is that an  
12 overt act, intended to effect the object of the conspiracy,  
13 be committed by at least one of the co-conspirators after  
14 the unlawful agreement has been made.

15 An overt act is a legal phrase, and lawyers  
16 use it, but it has a well recognized meaning.

17 An overt act is any step, action or conduct  
18 which is taken to achieve, accomplish or further the  
19 objective of the conspiracy.

20 The purpose of requiring proof of an overt act  
21 is that while parties might conspire and agree to violate  
22 the law, yet they may change their minds and do nothing to  
23 carry it into effect, in which event it will not constitute  
24 an offense.

25 An overt act need be neither a criminal act,

1 ks7

2 nor the very crime which is the object of the conspiracy.

3 Thus, in this case, the overt acts listed in  
4 the indictment are as follows:

5 "1. On or about June 16, 1976, the defendant  
6 Check Fong sold approximately one ounce of heroin  
7 to an undercover agent for \$2,800.

8 "2. On or about June 22, 1976, the defendant  
9 Check Fong met with Chali Prateepmanowong, a/k/a  
10 'Charlie', a/k/a 'Chan Kwok', at the Eastern  
11 Airlines Terminal at LaGuardia Airport, Flushing,  
12 New York.

13 "3. On or about June 30, 1976, the defendants  
14 Check Fong and Chali Prateepmanowong, a/k/a 'Charlie',  
15 a/k/a 'Chan Kwok', flew from New York to Tampa,  
16 Florida.

17 "4. On or about June 30, 1976, the defendant  
18 Terradej Kachenchi delivered approximately six  
19 ounces of heroin to the defendants Check Fong,  
20 Chali Prateepmanowong, a/k/a 'Charlie', a/k/a  
21 'Chan Kwok' and Chakkrip Gittisriboongul, a/k/a  
22 'Chakkrit Gittesriboongul', a/k/a 'Chak', in  
23 Tampa, Florida.

24 "5. On or about June 30, 1976 the defendants  
25 Check Fong, Chali Prateepmanowong, a/k/a 'Charlie',



ks8

a/k/a 'Chakkrit Gittersiboongul', a/k/a 'Chak', sold approximately six ounces of heroin to undercover agents for \$13,500 in Tampa, Florida.

"6. On or about July 28, 1976, the defendant Check Fong gave an undercover agent a free sample of heroin in the vicinity of Allen Street, New York, New York.

"7. On or about August 2, 1976, defendants Check Fong and Milton Liu possessed and offered for sale to an undercover agent approximately six ounces of heroin in a parking lot on 92nd Street between 57th and 59th Avenues in Queens, New York."

As Mr. Levine said to you during his summation on behalf of the Government, the Government did not submit any evidence during the course of this trial in respect of the last two overt acts that I have just read to you, and which are numbered 6 and 7 in the indictment.

You will observe that some of these overt acts refer to criminal conduct, allegedly the object of the conspiracy, such as the distribution of heroin to purchasers.

However, other overt acts appear on the surface to be quite innocent.



1 ks9

2 Thus, for Mr. Check Fong and Mr. Prateepmanowong  
3 to fly from New York to Tampa, Florida, and to meet in  
4 Tampa, Florida with Mr. Gittisriboongul or Mr. Kachenchi  
5 is not in and of itself criminal conduct.

6 But if, as the Government charges, the plane  
7 flight and meeting was for the purpose of furthering a  
8 distribution of heroin, then the flight and the meeting  
9 shed their outward innocent purpose and become overt acts  
10 to further the purposes of an illegal enterprise.

11 It is not necessary for the Government to prove  
12 that each member of the conspiracy committed or partici-  
13 pated in a particular overt act, since the act of any  
14 one done in furtherance of the conspiracy becomes the act  
15 of all the other members.

16 Also, the Government is not required to prove  
17 each of the overt acts alleged in the indictment. They  
18 have not done so, nor, indeed is the Government required  
19 to prove any of those precise overt acts referred to in  
20 the indictment.

21 It is sufficient in law if the Government  
22 proves the commission of at least one overt act, as we  
23 have defined that term, in furtherance of the conspiracy  
24 at or about the time alleged within the Southern District  
25 of New York -- and as I charged you, the Borough of



ks10 .

Manhattan is within the Southern District of New York.

While the indictment charges that the conspiracy existed from on or about May 1, 1976 and continuously up to December 6th, 1976, it is not essential that the Government prove the conspiracy started and ended on or about those specific dates.

(Continued on next page.)

T5

1 rgal

2 It is sufficient if you find that in fact  
3 a conspiracy was formed and existed within the period  
4 set forth in the indictment and that at least one  
5 overt act was committed in furtherance thereof within  
6 that period and within the Southern District of New  
7 York.

8 To sum up then, under the conspiracy count  
9 in order to convict the defendants, or either one of  
10 them, you must find beyond a reasonable doubt:

- 11 1. The existence of a conspiracy as  
12 charged;
- 13 2. A knowing participation in that con-  
14 spiracy by the particular defendant you have under  
15 consideration; and,
- 16 3. The commission of an overt act in  
17 the Southern District of New York by a co-conspirator  
18 in furtherance of the conspiracy.

19 Please remember that, as I have said pre-  
20 viously, you are considering the two defendants in this  
21 case and the guilt of each defendant is a personal  
22 question. That is to say, with respect to the  
23 guilt of each defendant the government must prove each  
24 of the three elements I have just referred to beyond  
25 a reasonable doubt.



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I have already instructed you on the meaning of reasonable doubt.

If each of the necessary elements has been so proved as to a particular defendant, then you must convict him of conspiracy. On the other hand, if any one of the elements has not been so proved as to a particular defendant, then you must acquit him of conspiracy.

I am about to turn to the substantive count in the indictment, so why don't we just sit back and relax for a moment before I come to that.

(Recess.)

THE COURT: Turning to the substantive count which involves only Mr. Gittisriboongul and not Mr. Kachenchi, the substantive count appears in count 2 of the indictment, which reads that the grand jury charges that on or about the 16th day of June, 1976 in the Southern MDistrict of New York, Chakkrip Gittisriboongul, Check Fong and Milton Liu unlawfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately one ounce of heroin.

I have already read to you the law upon which this substantive violation is based, but let me



1 rga3

2 read it to you again.

3 The law prov des, in pertinent part:

4 "It shall be unlawful for any person  
5 knowingly or intentionally to distribute or possess  
6 with intent to distribute a controlled substance."

7 In order to find the defendant, Mr.  
8 Gittisriboongul, guilty of this count the government  
9 must establish beyond a reasonable doubt:

10 1. That on or about the date charged  
11 therein he distributed or possessed with intent to  
12 distribute heroin, a narcotic controlled substance;

13 2. That he did so knowingly or intention-  
14 ally. This second element means that he knew  
15 what he was doing, that the distribution or posses-  
16 sion with intent to distribute was deliberate and  
17 purposeful, that his acts or conduct were calculated  
18 and not due to inadvertence, neglect or mistake;  
19 and,

20 3. The third element, that the substance  
21 involved was in fact heroin, a narcotic controlled  
22 substance.

23 I charge you as a matter of law that  
24 heroin is a narcotic controlled drug. Here the  
25 government has offered by stipulation the testimony



1 rga4

2 of a chemist that the contents of the one ounce  
3 of heroin involved -- I believe it is Exhibit 2 in  
4 evidence -- includes heroin.

5 A few words about what is meant by dis-  
6 tributing or possessing with intent to distribute.

7 You will note that the first element of  
8 the offense consists of either distribution or posses-  
9 sion with intent to distribute a narcotic drug. The  
10 word "distribution" is used in its ordinary sense.  
11 It simply means to transfer, to pass on or hand over  
12 to another.

13 The word "possess" means to have something  
14 within your control. This does not necessarily  
15 mean that you must hold it physically. As long as  
16 an object is under your control you possess it.

17 The word "intent" refers to a person's  
18 state of mind, so the term "possess with intent to  
19 distribute" means to control an item with the state  
20 of mind or purpose to transfer or pass that item or  
21 deliver it to another person. That purpose may  
22 involve a contemplated sale, but a sale is not required.  
23 However, in this case the government contends that  
24 the possession with intent to distribute was to effect  
25 a sale.



1 rga5

2 A further instruction on the word  
3 "possess." Possession may be of two types,  
4 actual or constructive. Actual possession means  
5 that a defendant knowingly has personal, manual or  
6 physical control of the narcotics. Constructive  
7 possession exists where the narcotics are in the physical  
8 possession of or handled by another person, but the  
9 defendant, the person alleged to have constructive  
10 possession, has the power to exercise control over the  
11 narcotics or their distribution, their movement,  
12 or to set the price for their sale or to cause their  
13 delivery.

14 So, too, one who has a working relationship  
15 with another, who has physical custody of narcotics  
16 so as to cause or effect their delivery to a prospective  
17 purchaser in consummation of the sale, may be said to  
18 have constructive possession of the narcotics.

19 If upon all the evidence you are satis-  
20 fied that Mr. Gittisriboongul had possession of a  
21 quantity of heroin, that he knew it was heroin, and  
22 further find that the government has established beyond  
23 a reasonable doubt the essential elements of the  
24 crime as I have just given them to you, that would  
25 be sufficient to convict.



rga6

To further establish its charge under the second count against Mr. Gittisriboongul, the government also relies upon the aiding and abetting law, which provides:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

2 This a rule of criminal responsibility for  
3 acts which one assists another in performing.

4 Thus, not only is the person who commits an  
5 illegal act guilty, but anyone who consciously shares in  
6 and furthers the criminal act.

7 In short, two or more persons may be involved  
8 in the commission of a crime, their roles may be different,  
9 and yet each may be held responsible. To aid and abet  
10 another to commit a crime, it must be shown beyond a  
11 reasonable doubt that a defendant in some way knowingly  
12 associated himself with and furthered the criminal venture  
13 of one who actually commits the crime, intending that it  
14 succeed.

15 In other words, if one fully aware of what he  
16 is doing plays a significant role in facilitating or  
17 furthering a transaction prohibited by law, then that  
18 person is equally with the person who directly performed  
19 the illegal act, even though the latter played a much  
20 greater or more major part in the perpetration of the  
21 crime.

22 However, knowledge of the crime being  
23 committed or presence at the scene by itself does not  
24 establish that a defendant is an aider or abettor.

25 The companion of a person engaged in a crime



1 ks2

2 is not an aider and abettor merely because he furnishes  
3 company to the person engaged in a crime. More is  
4 required to establish that one is an aider and abettor.

5 There must be proof that the defendant did  
6 something to forward the crime.

7 In the present case the Government's evidence  
8 is that on or about June 16, 1976 in Manhattan, Special  
9 Agent Toal purchased one ounce of heroin from Check Fong.

10 You are required, in connection with that  
11 sale and within the context of the aiding and abetting  
12 statute, to consider the participation, if any, of the  
13 defendant Gittisriboongul.

14 If you find that Mr. Gittisriboongul associated  
15 himself in the venture with Mr. Fong or with others, and,  
16 in that venture that Mr. Fong or others were engaged in,

17 he participated in it as something that he wished  
18 to bring about, and that he sought by his action to make  
19 it succeed, then you have sufficient upon which to find  
20 that he was an aider and abettor.

21 Accordingly, you may find Mr. Gittisriboongul  
22 guilty of the offense charged if you find beyond a reasonable  
23 doubt that Mr. Fong as the principal to distribute and  
24 possess with intent to distribute, and Mr. Gittisriboongul  
25 aided and abetted it, provided, of course, that the



1 ks3  
2 Government also establishes beyond a reasonable doubt the  
3 other elements of the crime.

4 To make such a finding you must be satisfied  
5 beyond a reasonable doubt that the defendant was aware  
6 that narcotics were being illegally distributed and sold,  
7 and that he knowingly and intentionally played a signifi-  
8 cant role in furthering the transaction, and that he was  
9 not merely a spectator or innocent bystander.

10 If you are not so satisfied, then he cannot  
11 be held as an aider and abettor.

12 In what I have been saying to you on the aiding  
13 and abetting statutes, I have been concerned only with  
14 the actual sale of heroin alleged in Count 2 of the in-  
15 dictment. The aiding and abetting statute plays on part  
16 whatsoever in your determination of guilt or innocence  
17 with respect to Mr. Gittisriboongul or Mr. Kachenchi under  
18 the conspiracy count of the indictment. Whether or not  
19 you return a verdict of guilty or not guilty on the con-  
20 spiracy count depends upon the factors as to which I  
21 instructed you on the conspiracy count of the indictment,  
22 Count 1.

23 I will not outline the evidence and the con-  
24 tentions upon which the parties rely.

25 Counsel have summed up extensively. To



ks4

review in detail the testimony of each witness would be unnecessary. The Government must establish its burden on the substantive and conspiracy counts, and relies principally upon the testimony of Undercover Agent Toal and Mr. Prateer-anowong, who testified to certain heroin transactions in order to establish the conspiracy under Count 1, and the substantive charge under Count 2.

In addition to the foregoing, the Government relies upon circumstantial evidence to support its charges.

The defendants challenge the Government's case. They rely upon their presumption of innocence in their favor, and they point to the contradictions in the evidence offered by the Government's witnesses and the absence of evidence of certain points which they urge are significant. They attack the credibility of the principal witnesses against them. They contend that the Government's case does not establish guilt beyond a reasonable doubt as to any of the charges.

I have not, as I say, adverted to all of the evidence upon which the Government and the defendants rely to support their respective contentions. All evidence, whether or not I have referred to it, is important and must be considered by you.



ks5

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2 If by any chance I have made reference to any  
3 evidence which does not agree with your recollection,  
4 and I have stated this before, you are to disregard such  
5 references by me, and I emphasize the importance of this  
6 to you as strongly as I know how.

7 Always it is your recollection and your recol-  
8 lection that governs.

9 You are called upon to decide the fact issues  
10 here which will require you to pass upon the credibility  
11 of witnesses.

12 Now how do you decide that? I think I  
13 mentioned at the start of the trial that it would be  
14 desirable and important for you not only to listen but  
15 to look at the witnesses as they testify. Your deter-  
16 mination of the issue of credibility very largely must  
17 depend upon the impression that a witness made upon you,  
18 as to whether or not he was telling the truth or giving  
19 you an accurate version of what happened.

20 It is frequently said to jurors that when you  
21 walk into the jury box, and when you go from the jury  
22 box to the room where you will conduct your deliberations,  
23 you have your common sense, you good judgment and your  
24 experience with you. You decide whether or not a  
25 witness was straightforward, truthful, or whether he



1 ks6

2 attempted to conceal anything; whether he has a motive  
3 to testify falsely; whether there is any reason why he  
4 might color his testimony.

5 The ultimate question for you to decide in  
6 passing upon credibility is, did the witness tell the truth  
7 here before you as to the essential material matters?

8 It is for you to say whether a witness at  
9 this trial was truthful in whole or in part, in light of  
10 his demeanor and all of the evidence in the case

11 Mr. Prateepmanowong was, by his own admission,  
12 a participant and an accomplice in the conspiracy charged  
13 in the indictment. He has pled guilty to the conspiracy  
14 charged against him.

15 As I have already noted, that is his personal  
16 plea of guilt and is binding only upon him.

17 In certain types of crime the Government of  
18 necessity is frequently compelled to rely upon the  
19 testimony of accomplices. Otherwise it would be  
20 difficult to detect and to prosecute some wrongdoers,  
21 and this is particularly true in conspiracy cases.

22 Often the Government has no choice in the  
23 matter. It must take the witnesses and the transactions  
24 as they are.

25 There is no requirement in Federal criminal



1 ks7

2 law that the testimony of an accomplice be corroborated.  
3 It by no means follows that simply because is an accomplice  
4 he is not capable of giving a truthful version of events.

5 A conviction may rest upon the uncorroborated  
6 evidence of such a witness if it is found credible by you  
7 as finders of the fact.

8 However, the testimony of a witness who is  
9 an alleged accomplice, or an acknowledged accomplice, should  
10 be viewed with great caution and scrutinized carefully.

11 The question, I repeat in this case is, did  
12 Mr. Prateepmanowong tell the substantial truth before you?  
13 That is for you to judge.

14 Thus, you are at liberty to consider that  
15 weight, if any, should be given to the defense argument  
16 that a witness may color his testimony in the hope that a  
17 judge may give him recognition for such cooperation.

18 (Continued on next page.)  
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2 In the case of Mr. Prateepmanowong's testi-  
3 mony, the question that arises is whether he colored  
4 his testimony in the hope that he can secure more  
5 favorable treatment at the time of sentence. That  
6 question and all questions concerning credibility  
7 are for you and you alone to decide. If you find  
8 that his testimony was deliberately untruthful, then you  
9 should unhesitatingly reject it. On the other hand,  
10 if you were satisfied that he gave a truthful version  
11 of events and that upon the totality of the evidence  
12 the government has sustained its burden of proof as  
13 outlined in these instructions, then you have sufficient  
14 cause upon which to convict.

15 However, the government contends that en-  
16 tirely apart from Mr. Prateepmanowong's evidence the  
17 testimony of the enforcement agents is sufficient  
18 to sustain its charges.

19 The fact that the agents were law-enforce-  
20 ment officers does not require that you give their testi-  
21 mony greater weight or credence than that accorded the  
22 testimony of any other witness. Their credibility  
23 is to be judged by the same standards applied to other  
24 witnesses who testified, taking into account their man-  
25 ner, demeanor, motives and other factors which bear



1 rga2

2 on credibility.

3 If you find that any witness has wilfully  
4 testified falsely to any material fact, you have a  
5 right to reject the testimony of that witness in total,  
6 or you may accept only that part or portion which  
7 commends itself to your belief, or which you may find  
8 corroborated by other evidence in the case.

9 During the evidence and during summations  
10 there was reference to the fact that certain individuals  
11 were not called, and you heard of certain individuals  
12 who did not appear before you on this trial. In a  
13 federal criminal trial both the government and the de-  
14 fendant are entitled to receive from the clerk of the  
15 court a subpoena calling for the attendance of a  
16 witness and no matter where the witness lives in the  
17 United States he is required to appear when  
18 served with a subpoena.

19 You heard reference to Mr. Check Fong.  
20 This individual could have been called by either side  
21 as a witness, so that from the failure of either side,  
22 the government or defendants, to call him you may  
23 infer that his testimony might have been unfavorable  
24 to either the government or to a defendant, but it is  
25 equally within your discretion to draw no inference at



1 rga3

2 all from the failure of the government or a defendant  
3 to call this particular witness.

4 The defendants have not testified in this  
5 case. That is their absolute right and in no  
6 respect may it be considered by you as any evidence  
7 against them or as a basis for any presumption or  
8 inference unfavorable to them. You must not permit  
9 that fact to enter into your deliberations or dis-  
10 cussion in any respect whatsoever.

11 For the government to prevail, it must,  
12 with respect to each count, prove the essential ele-  
13 ments by the required degree of proof as already  
14 explained in these instructions. If it succeeds on  
15 a particular count as to a particular defendant, your  
16 verdict should be guilty. If it fails, it should  
17 be not guilty.

18 You must consider each count separately  
19 and render a separate verdict as to each defendant  
20 concerned in each count.

21 The verdict in each instance must be unani-  
22 mous. You may, if you wish, report your verdicts  
23 separately from time to time as you reach them  
24 unanimously, if that will aid you in your delibera-  
25 tions, or you may wait until you have concluded all



1 rga4

2 your deliberations. That is entirely up to you.

3 I just wish to make it plain to you  
4 that if in the course of your deliberations you have  
5 still not decided certain issues but you have  
6 reached a conclusion as to the guilt or innocence of  
7 a particular defendant on any particular count, it is  
8 entirely proper for you so to advise the marshal and  
9 the clerk and to come back and record that part of  
10 the verdict and then go back and resume your delibera-  
11 tions on such issues as you have not yet decided.

12 Your function is to weigh the evidence  
13 in the case and to determine the guilt or innocence  
14 of the defendants solely upon the evidence and  
15 these instructions.

16 Under your oath as jurors you cannot  
17 allow a consideration of the sentence which may be  
18 imposed upon a defendant, if he is convicted, to enter  
19 into your deliberations or to influence your  
20 verdict in any way. Your duty is to decide the  
21 case solely and only upon the evidence.

22 In the event of conviction, the duty of  
23 imposing sentence rests solely with the court and you  
24 are not to be concerned with it.

25 Each juror is entitled to his or her own



1 rga5

2 opinion, but each should, however, exchange views  
3 with his or her fellow jurors. That is the very  
4 purpose of jury deliberation, to discuss and to con-  
5 sider the evidence, to listen to the arguments of  
6 fellow jurors to present your individual views, to  
7 consult with one another and to reach an agreement  
8 based solely and wholly upon the evidence, if you  
9 can do so without violence to your own individual  
10 judgment.

11 Each one must decide the case for himself  
12 or herself after consideration with his or her fellow  
13 jurors, but you should not hesitate to change an  
14 opinion which, after discussion with your fellow jurors,  
15 appears erroneous. However, if after carefully con-  
16 sidering all the evidence and the arguments of your  
17 fellow jurors you entertain a conscientious view  
18 that differs from others, you are not to yield your  
19 conviction simply because you are outnumbered or  
20 outweighed. Your final vote must reflect your  
21 conscientious conviction as to how the issues  
22 should be decided.

23 I repeat that you may ask to hear evi-  
24 dence read to you or you may have exhibits sent in to  
25 you.



1 rga6

2 Also if you wish I will repeat any part  
3 of this charge during your deliberations.

4 Any such requests should take the form  
5 of a note from the forelady of the jury to me.  
6 Please make any such requests as specific as possible.  
7 Be very careful that any such note gives no indication  
8 whatever of the current state of your thinking on  
9 any count.

10 Your verdict will be announced only at the  
11 end of the trial and in open court. That verdict  
12 will take the form of separate findings of guilty or  
13 not guilty as to Mr. Gittisriboongul and Mr. Kachenchi  
14 on count 1 and guilty or not guilty as to Mr.  
15 Gittisriboongul on count 2.

16 Those are my instructions on the law to you,  
17 ladies and gentlemen, but what I am going to do  
18 now is to give counsel an opportunity to meet me  
19 in the robing room and to make any requests for  
20 additional charges or any objections to charges  
21 which I have given. I will simply ask you  
22 to stay relaxed in your seats for a moment while I  
23 meet with counsel for this purpose and then  
24 we will all come back again. If you will simply just  
25 stay there a few minutes, I will see counsel in the  
robing room.



T8 pm

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(Following in the robing room.)

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THE COURT: Mr. Levine, does the Government have any requests or objections to the charge?

5

MR. LEVINE: No, your Honor.

6

THE COURT: Mr. Zinner, how about defendant Kachenchi?

7

8

MR. ZINNER: No requests and no objections.

9

THE COURT: Mr. Jaffe?

10

MR. JAFFE: No requests and no objections.

11

THE COURT: All right, thank you, gentlemen.

12

We will now go back to the courtroom.

13

(In open court.)

14

THE COURT: I have no changes to make to the charge, ladies and gentlemen, so you are about to commence your deliberations.

17

At this time it is my duty to discharge from their responsibilities in this case the two alternate jurors, Mrs. Cerra and Mr. Hollander.

18

19

20

You have served faithfully and well as alternate jurors in this case.

21

22

You have followed the evidence and the speeches and the charge just as carefully as the first 12 jurors. Happily it has not proved necessary to replace one of the first 12 jurors by reason of ill-health or any other reason.

23

24

25



ks2

1  
2 So you will leave us now and will not go  
3 into the jury room and participate in the deliberations.

4 I should be very concerned if in leaving this  
5 trial without participating in the last stages of it you  
6 left with any feeling that your presence here has not  
7 been important or that you have not rendered valuable  
8 services to the Court; that is not the fact. Your  
9 presence and your availability and your participation  
10 throughout the trial up to the very moment have been quite  
11 essential to the proper conduct of the trial and the  
12 administration of justice, and so I hope you have an aware-  
13 ness of your own service and your own participation.

14 I discharge you now from this court with my  
15 deep thanks.

16 Mr. Farley, will you give additional appropri-  
17 ate instructions to them?

18 THE CLERK: Your Honor, may the two alternate  
19 jurors get their belongings from the jury room?

20 THE COURT: By all means.

21 (Whereupon the two alternate jurors left the  
22 courtroom.)

23 THE CLERK: The jury room is clear, your  
24 Honor.

25 THE COURT: Very well, Mr. Farley, if you



1 ks3

2 will distribute to the jurors now copies of the indict-  
3 ment.

4 (The Clerk hands copies of the indictment to  
5 the jurors.)

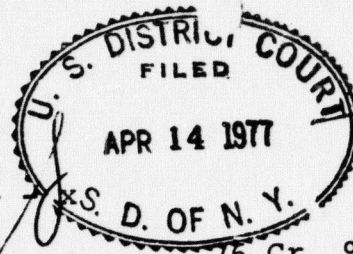
6 THE COURT: I will now ask you, ladies and  
7 gentlemen, to retire to the jury room and commence your  
8 deliberations in this case.

9 (Whereupon the jury left at 3.15 p.m.)

10 (Continued on next page.)  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

-against-

CHAKKRIP GITTISRIBOONGUL, a/k/a  
Chakkrit Gitteariboongul, a/k/a  
Chak, and TERRADEJ KACHENCHAI,

Defendants.

MEMORANDUM DECISION & ORDER

HAIGHT, District Judge:

Defendants Gittisriboongul and Kachenchai move this Court to dismiss the indictment returned against them on October 1, 1976 charging each with violations of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code—conspiracy to distribute heroin—and, in the case of Gittisriboongul, with the distribution of one ounce of heroin in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) Title 21, United States Code. On February 16, 1977 the trial of the defendants commenced before this Court. Prior to the testimony of a Government witness, Special Agent John Toal, Assistant United States Attorney Alan Levine provided counsel for both Kachenchai and Gittisriboongul with copies of Toal's prior statements pursuant to 18 United States Code, Section 3500. Included in these documents was the grand jury testimony of Agent Toal given on October 1, 1976 and December 6, 1976, respectively. During the course of the Toal testimony, defendant Kachenchai moved to dismiss the indictment relying on the nature of the testimony of Agent Toal before the grand

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jury. The gravamen of the Kachenchai application concerned the extensive use of leading questions to elicit the testimony of Agent Toal which, as the Kachenchai argument went, amounted to no testimony at all, and rose to a denial of due process since Toal did nothing more than to confirm the chronology and description of the events as presented by the Assistant United States Attorney to the grand jury. Defendant Gittisriboongul joined in this motion and argued, in addition, that no evidence was presented to the grand jury as to him on count two.

I.

Early federal authority was split on the applicability of rules of evidence to proceedings before the grand jury. Holt v. United States, 218 U.S. 245 (1910), concerned review of a conviction for murder committed within the Fort Worden Military Reservation. One of the grounds urged for reversal was the consideration by the grand jury that indicted Holt of clearly incompetent evidence. In considering and disposing of this claim, the Supreme Court noted on pages 247-248:

"Without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review, United States v. Rosenburgh, 7 Wall. 580, it is enough to say that there is no reason for reviewing it here. All that the affidavit disclosed was that evidence in its nature competent, but made incompetent by circumstances, had been considered along with the rest. The abuses of



criminal practice would be enhanced if indictments could be upset on such a ground. McGregor v. United States, 134 Fed. Rep. 187, 192, 430. Radford v. United States, 129 Fed. Rep. 49, 51. Chadwick v. United States, 141 Fed. Rep. 225, 235."

Subsequently, the Court of Appeals for the Eighth Circuit recognized the invalidity of indictments based solely on incompetent or insufficient evidence. In Nanfito v. United States, 20 F.2d 376 (8th Cir. 1927); the Court of Appeals, in reversing convictions for various violations of United States laws governing distillery operations, noted succinctly on page 378 of its opinion that:

"It has been established that the evidence received before a grand jury must be competent, legal evidence, such as is competent before a petit jury, United States v. Reed, Fed. Cas. 727, No. 16, 134, 2 Blatchf. 435, and this is a proper rule for the guidance of grand juries."

In Brady v. United States, 24 F.2d 405 (8th Cir. 1928), the Court of Appeals expanded on its earlier discussion in Nanfito, and, in reversing several convictions for conspiracy and use of the mails to defraud, noted that:

"It is the settled law of this circuit, we think, that an indictment will be quashed, where there was either no evidence whatever, or no competent evidence of the offense charged, presented to the grand jury. (citations omitted)." (24 F.2d 406 at 408-409).



Notwithstanding the pronouncements by the Eighth Circuit, other federal courts throughout the country still held that an indictment was not challengeable on grounds of inadmissible or inadequate evidence,<sup>1</sup> although there was occasional dicta supporting dismissal of an indictment where no supporting evidence had been presented to a grand jury, see United States v. National Wholesale Druggists' Ass'n, 61 F.Supp. 590, 593-94 (D.N.J. 1945) (dictum); United States v. Silverthorne, 265 Fed. 853, 855 (W.D.N.Y. 1920) (dictum); United States v. Gouled, 253 Fed. 242, 246 (S.D.N.Y. 1918) (dictum).

It was against this background that the Second Circuit decided the case of United States v. Costello, 221 F.2d 668 (2d Cir. 1955), in 1955. An interesting study of the trial and intermediate appellate treatment of United States v. Costello is found in 1963 Wash. U.L. Quarterly 102, 106 (1963):

"Frank Costello was indicted for willfully attempting to evade payment of federal income taxes. A pre-trial motion to dismiss the indictment was denied. At the trial, the government offered evidence designed to show increases in the defendant's net worth as proof that he received more income during the years in question than he had reported. Defense counsel questioned each of the 144 government witnesses to determine which ones had testified before the grand jury; only the three investigating officers had. At the close of the government's case, another motion for dismissal of the indictment was made on the ground that the only evidence before the grand jury was hearsay, since the three officers had no firsthand knowledge of the transactions upon which their computations were based.



This motion was denied and defendant was convicted.

"The conviction was upheld on appeal, Judge Learned Hand saying:

"It is indeed well settled that the admission of incompetent evidence at the inquest is not a ground for dismissing the indictment; but at times the courts have assumed that it is otherwise, if all the evidence is incompetent [citing the Nanfite and Brady cases]... If 'incompetent' is to cover all evidence, however rationally persuasive it may be, that would be excluded at a trial with great deference we cannot agree. Legal rules presuppose that the occasions to which they apply, shall be decided under the ordinary postulates of reasoning; and the exclusionary rules are an exception, for they apply to evidence that is relevant rationally, but that courts will not accept, not because it does not prove the issue, but it is thought unjust to the opposite party to use it against him, or because it is within some privilege to suppress the truth. We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated."

The United States Supreme Court reviewed the decision in United States v. Costello (350 U.S. 359 [1956]), and set forth the appropriate standard to be used by a trial court in evaluating challenges to an indictment, alleged to be based on either inadequate or incompetent evidence.

"If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency



and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." (350 U.S. 359, 363).

An interesting analysis of the possible reasons behind the Supreme Court's decision in United States v. Costello, supra, is found in a law review article entitled "Validity of Indictment Based Solely on Hearsay:..When Direct Testimony Is Readily Available", 43 N.Y.U. L. Rev. 578, 581 (May 1968), in which the author noted that hearsay evidence—like the leading question—retains a predictive value which other incompetent evidence lacks—an important distinction since:

"[W]hen hearsay is admitted, it does not follow that a grand jury's effectiveness will be diluted. Unlike the coerced confession or the illegal wiretap which will never have probative value at trial, hearsay, by its very nature, may be translated into competent evidence by the time of trial if the originator or primary source of the hearsay testifies in court. Consequently, hearsay retains a predictive value which other incompetent evidence lacks. Moreover, the primary justification for excluding hearsay at trial—the inability to determine its trustworthiness by cross examination—is not appropriate at the grand jury stage, since there will be no cross examination of any evidence presented by the prosecution, competent or incompetent."

Recent judicial pronouncements make clear that a grand jury is not restrained by the technical, procedural and evidentiary rules governing conduct of criminal trials,



United States v. Calandra, 94 S.Ct. 613, 414 U.S. 338, 38 L.Ed.2d 561; United States v. Pike, 523 F.2d 734, 736 (5th Cir. 1975); Coppedge v. United States, 311 F.2d 128, 132 (D.C.Cir. 1962); and United States v. McCloskey, 273 F.Supp. 604 (S.D.N.Y. 1976).

The defendants direct this Court's attention to United States v. Tane, 329 F.2d 848 (2d Cir. 1964); but reliance on this case is clearly misplaced. In United States v. Tane, supra, the district court dismissed the indictment because the only testimony before the grand jury was from a witness testifying as the result of an illegal wiretap. Such testimony could not be made admissible at trial, and in the absence of untainted evidence to sustain the underlying charges, the indictment had to be dismissed. See United States v. Schipani, 315 F.Supp. 253 (E.D.N.Y. 1970), permitting the Government to sustain its indictment through untainted evidence, notwithstanding the existence of illegally obtained proof.

It is clear, therefore, that the presentation of incompetent evidence to a grand jury does not ipso facto invalidate an indictment.

As was noted in The Rules of Evidence as a Factor in Probable Cause In Grand Jury Proceedings and Preliminary Examination, 1963 Wash. U.L. Quarterly 102, 104 (1963):

"The Constitution of the United States requires a grand jury proceeding when the defendant is accused of an infamous crime. Both the Constitution and the Federal Rules of Criminal Procedure are silent concerning



the kind of evidence the grand jury may receive and upon which it may return an indictment. Nevertheless, federal grand juries are often instructed that they shall act upon only 'legal' evidence or 'competent' evidence. Whatever inferences one might be tempted to draw from such language, it is clear from the cases that violations of these grand jury instructions have no effect upon the validity of indictments."

## II.

Turning to the specifics of the instant motion, it is clear that the testimony of Special Agent Toal before the grand jury was the result of extensive, if not exclusive, use of leading questions—clearly not a preferred mode of examination. But use of leading questions does not necessarily result in proof which is incompetent. The test of competent evidence is reliability. As was noted in 1 Wharton Criminal Evidence §154 p. 284-285:

"Competence is applied both to evidence and to witnesses. As applied to evidence, it means that the evidence has been obtained in such a way, from such a source, and is in such a form that it is deemed proper to admit it.

"Evidence must be competent to be admissible. Thus, a confession obtained as a result of coercion is not admissible because it would represent evidence which was obtained in an improper way; a statement by a witness of what a third person had told him is generally not admissible because the source of such evidence would be hearsay; and a carbon copy of a writing would represent an improper form of evidence which would not be admissible unless a satisfactory explanation has been given for the failure to produce the original. In such cases, exclusion is based on the belief that the evidence would not be reliable."



Additionally, it must be remembered that this Court has the benefit of Mr. Toal's testimony at trial—testimony which was clearly competent, and obtained by means of proper and non-leading questioning; and which clearly affirms the sum and substance of his testimony before the grand jury.<sup>3</sup>

Agent Toal was subjected to extensive and effective cross-examination, and as the Government observes in its brief on page 8:

"The defendants suffered no denial of Sixth Amendment rights at the trial. Agent Toal testified and was cross examined. Certainly, he was bound by the answers he gave to the leading questions, and was available to testify about any prior inconsistent statements. Moreover, '[T]he reports of [Toal] - supplied to the defendants - were so detailed as to afford the equivalent of grand jury testimony for impeachment purposes.' United States v. Arcuri, 282 F.Supp. 347, 350 (E.D.N.Y. 1968), aff'd. 405 F.2d 691, 693 (2d Cir. 1968)."

I find therefore that there was no violation of defendants' rights of confrontation as guaranteed by the Sixth Amendment.

Likewise, it is clear that defendants have suffered no denial of due process under the Fifth Amendment. As was stated in Costello v. United States, supra, at page 362:

"[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries act."

Although interesting, defendants' New York authority is inapposite to the instant discussion. In Disclosure of



Grand Jury Minutes to Challenge Indictments and Impeach  
Witnesses in Federal Criminal Cases, 111 U.Pa.L.Rev. 1154,  
1165-67 (1963), the following comparisons between the federal  
and New York grand jury systems were made:

"The Supreme Court's consistent reluctance to examine the propriety of indictments is shared by some state courts. But in New York the conception of the grand jury's function differs from the federal approach as defined in Costello. Although the federal grand jury stands as a barrier between charge and trial, its standard apparently is whether the accused is probably guilty of the charged offense. In New York, however, the grand jury is intended to provide a more positive check on the prosecutor by sifting out cases unlikely to result in trial convictions. New York courts, although cognizant of the problems of extended pretrial litigation, quash indictments returned on the basis of incompetent, insufficient, or illegal evidence. In order to enable defendants to support motions to quash on these grounds, disclosure of the minutes is granted if the trial judge determines on in camera inspection that colorable grounds have been asserted in the motion to quash. This more time-consuming process, of course, offers the defendant greater opportunity to overturn a defective indictment.

"Whether the possible detriment to the indicted person when indictments are substantially inviolable and disclosure relatively circumscribed calls for a more liberalized approach in the federal system despite the potential delay depends on an evaluation of the policy judgments behind the conflicting schemes. The screening function of New York's grand jury reflects that state's decision to protect innocent persons from the stigma of unwarranted indictment and criminal trial. On the other hand, the federal emphasis upon the need for secrecy and expeditious administration results from a judgment that the basic function of the grand jury is to determine probability of guilt, not conviction. Although the federal procedure may subject a person to the strain of indictment and criminal trial even though the admissible evidence against him would not sustain a conviction, this hardship probably does not assume constitutional proportions. That a



substantial constitutional claim independent of the fifth amendment grand jury clause might warrant the additional time and inconvenience necessary for pretrial inspection by the trial judge and ultimate disclosure of the minutes to defendants is opposed to neither the federal concept of the grand jury's function nor Costello's limitation of indictment challenges." (emphasis added).

In summary, I believe that the extensive use of leading questions by the Government in questioning Special Agent Toal did not rise to the level of a constitutional inequity, nor violate the rights of the defendants under either the Fifth or Sixth Amendments. Accordingly, as to the motions by defendants Gittisriboongul and Kachenchai to dismiss the indictment based on leading questions, I must deny their application.

### III.

Although I have held that the defendants' motions to dismiss the first count of the indictment must be denied, I reach a different conclusion with respect to the motion of defendant Gittisriboongul to dismiss count two of the indictment.

In that count, the grand jury charged that on or about June 16, 1976, in the Southern District of New York, defendant Gittisriboongul and three other individuals sold one ounce of heroin. Gittisriboongul contends that there was no evidence whatsoever presented to the grand jury with



respect to his participation in such a sale. I have examined the grand jury minutes, at which Special Agent Toal was the only witness, and defendant's claim is shown to be accurate. Indeed, counsel for the Government, with commendable candor, concedes in responding to the present motion that "the participation of Gittisriboongul in the sale of the one ounce of heroin as presented at trial by the witness Chali Prateepmanowong was not presented to the grand jury." (Government brief, at p. 7, emphasis added).

Notwithstanding that total absence of evidence, competent or otherwise, the Government contends that Gittisriboongul's conviction at trial on the second count of the indictment may stand. I do not agree.

The Government cites United States v. Tane, 329 F.2d 848, 854 (2d Cir. 1964) for the proposition that: "As long as there is some competent evidence to sustain the charge issued by the Grand Jury an indictment should not be dismissed." The Government then proceeds to argue, based upon Tane, that in the present case:

"Since the jury found the defendant Gittisriboongul guilty on Count Two on the basis of the testimony of Chali Prateepmanowong and the recorded conversations between Check Fong and agent Toal, Count Two should not be dismissed."

That argument misses the distinction between evidence presented to the grand jury and evidence adduced at trial. Where the grand jury is given no evidence whatsoever tending

to implicate a particular individual in a particular crime, an indictment charging that individual with that crime cannot stand; and the total absence of evidence cannot be cured on the trial, without making a mockery of the purposes which the grand jury is intended to serve. When properly analyzed, it is clear that the cases require some evidence before the grand jury of the charge set forth in the indictment.

Thus, in United States v. Schwartz, 464 F.2d 499 (2d Cir. 1972), upon which the Government places a primary if misplaced reliance, the Second Circuit did indeed recite the rule that "As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed." 464 F.2d at p. 511, quoting Tane, supra. However, it is clear from Schwartz that the "some competent evidence" referred to must be presented to the grand jury; see especially 464 F.2d at p. 511 n. 18.

Similarly, in Tane, supra, the Second Circuit, in affirming the dismissal of an indictment, stated:

"As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed. Cop-pedge v. United States, 311 F.2d 128, 132 (D.C.Cir. 1962), reversed on other grounds 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). Here the government concedes that the indictment rested almost exclusively on the testimony of Pase and that dismissal of the indictment was proper if Pase's testimony could not be used. In light of this concession, dismissal of the indictment could hardly be termed an abuse of discretion." 329 F.2d at pp. 853-4.



The testimony of the individual Pase, referred to in the court's discussion, was given before the grand jury; that testimony was subsequently held to be subject to suppression; and, in the absence of any other testimony upon which the indictment could rest, the indictment itself was subject to dismissal. That principle applies with equal force to the case at bar, in which no evidence whatsoever was presented to the grand jury to implicate Gittisriboongul in the sale alleged in count two of the indictment.

In Coppedge v. United States, 311 F.2d 128 (D.C.Cir. 1962), cert. den., 373 U.S. 946, the court considered the function of a grand jury, as defined by the Supreme Court in Lawn v. United States, 355 U.S. 339 (1958), and went on to observe:

"The Supreme Court emphasized the particular character and function of the Grand Jury to enable the government to bring people to trial promptly. The ultimate safeguard for the individual accused is at the trial where rules of evidence exclude incompetent testimony and where a timely motion requires the exclusion of evidence obtained in violation of the accused's constitutional rights.

"Thus, even assuming, arguendo, that the witness Thompson committed perjury before the Grand Jury, the indictment must be sustained if there was sufficient competent evidence before the Grand Jury...

"It is enough, as Judge McGuire held, that there is some competent evidence to sustain the charge issued by the Grand Jury even though other evidence before it is incompetent or irrelevant in an evidentiary sense or even false." 311 F.2d at pp. 131-2. (emphasis added).

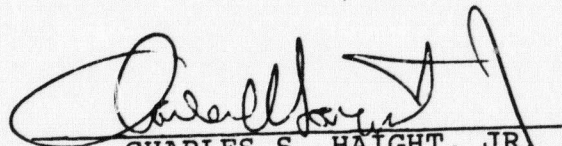
This discussion in Coppedge, which the Second Circuit cited in both Tane and Schwartz, makes it entirely clear that the minimal competent evidence necessary to sustain an indictment must be presented to the grand jury. In the absence of any evidence presented to the grand jury, a charge contained in an indictment cannot stand, and the defect cannot be cured by evidence adduced at trial.

IV.

For the foregoing reasons, the motions of defendants Gittisriboongul and Kachenchai to dismiss count one of the indictment are denied. The motion of defendant Gittisriboongul to dismiss count two of the indictment is granted.

It is So Ordered.

Dated: New York, New York  
April 12, 1977

  
CHARLES S. HAIGHT, JR.  
U. S. D. J.



### Footnotes

1. See 111 U.Pa.L.Rev. 1154, 1159 (1963).
2. See: In re Fried, 161 F.2d 453, 458 (2d Cir.), cert. granted, 331 U.S. 804, cert. denied, 331 U.S. 858, cert. dismissed, 332 U.S. 807 (1947): "[A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased." But cf. United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923), in which Judge L. Hand stated, in denying disclosure of grand jury records: "Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." Id. at 649.
3. This is not to say that a total lack of evidence before the grand jury may be cured by proof adduced at trial. On the contrary: as this Court holds in granting Gittisri-boongul's motion to dismiss the second count of the indictment, where there is no evidence whatsoever upon which the grand jury could found a charge, the indictment cannot stand, although sufficient proof was presented to the trial jury. However, in the case of hearsay evidence, or evidence developed in response to leading questions, the evidence is present, albeit in a form which could not be received at the trial. Such evidence, the federal authorities hold, is sufficient to sustain an indictment, although it must emerge in proper form to be considered at trial.

ML: 1

December 6, 1976

John H. Toal

Re: Chakkrip Gittisriboongul  
Check Fong, Milton Liu and  
Terradej Kachench

Gx 3502  
Nov. Reg.

Mr. Thomas H. Sear

J O H N H. T O A L, called as a witness,  
having been duly sworn by the Foreman of the  
Grand Jury, testified as follows:

BY MR. SEAR:

Q Would you state your name and spell it for the  
record, please. A John H. Toal, T-o-a-l.

Q Mr. Toal, how are you employed?

A Special AGent with the Federal Drug Enforcement Ad-  
ministration.

Q I direct your attention to June 16th of 1976. were  
you on duty that day? A Yes, I was.

Q And were you acting in an under cover capacity?

A Yes, I was.

Q And at approximately 4:00 or 5:00 p.m. that day,  
did you along with a cooperating individual proceed to  
Allen Street and East Houston Street in New York City?

A Yes, I did.

Q And at that time did you park your car, that is  
double park you car on Allen Street, and did the cooperat-  
ing individual get out of your car and meet with a man by the  
name of Check Fong? A Yes.

Q Fong, F-o-n-g. and then did the cooperating indi-  
vidual and Mr. Fong get back into the back seat of the car  
that you were driving? A Yes, they did.

Q Were you then introduced to Mr. Fong by the name  
Billy? A Yes.

Q And at that time did you observe Mr. Fong hand



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the cooperating individual a copy of the New York Daily

News that he was carrying in his hand?

A Yes,

I did.

Q And did you observe the cooperating individual open up the newspaper and find a double wrapped plastic

bag containing white powder?

A Yes.

Q After you saw that, did you then reach under the seat of the car and pull out a cigar box and hand it to

the cooperating individual?

A Yes, I did.

Q And did he then hand that box to Mr. Fong?

A Yes.

Q And inside the cigar box was there in fact \$2800 in official advanced funds of the Drug Enforcement Administration which had been placed in the box earlier?

A Yes.

Q Now the package that was given to the cooperating individual, was that later turned over to you?

A Yes, it was.

Q And was it subsequently taken to the regional laboratory of the Drug Enforcement Administration?

A Yes, it was.

Q And have you been informed that a chemical analysis was performed on the substance that was contained in that package?

A Yes.

Q And as a result of that analysis, were you informed that the Drug Enforcement Administration chemist found

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that the package contained 22.81 grams of heroin hydrochloride of 95.6%?

A Yes.

Q Now, I'm directing your attention to June 22nd of 1976, did Check Fong call you on that day?

A Yes, he did.

Q And at that time did you discuss with him the delivery by him to you of one pound of heroin?

A Yes, I did.

Q And did he tell you that the heroin would be delivered to you in Tampa, Florida, at the airport?

A Yes.

Q And did he tell you that there was an Eastern Airline Plane scheduled to leave at 1:20 p.m. for Tampa?

A Yes.

Q Did you tell him that you didn't like all the changes being made? That is, you objected to the change in location because it had been previously agreed that the sale would be in Washington, and then in Miami, and now it was being changed to Tampa, Florida?

A That's correct.

Q Did you tell him that you weren't sure about the whole deal at that particular time?

A Yes.

Q At that point -- I direct your attention to June 22, 1976 at approximately 11:00 o'clock in the morning, did Mr. Fong call you back and speak to you?

A Yes.

Q Prior to calling you back, when you were talking with



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him earlier, had you agreed on the price of approximately \$3,000 for the pound of heroin? A Yes.

Q When he called you back did he try to tell you that the delivery was taking place in Tampe, Florida, with no problems and that you could bring another person with you on the plane who could carry the money?

A Yes.

Q And you wouldn't have to tell him, Fong, who that person was? Is that right? A Right.

Q And did he tell you that once you got to Tampa that his connection, that is his source for the heroin, would show you the pound of heroin and then only if you were satisfied at that point would you have to produce the man with the money and make the exchange? A That's right.

Q Did there come a time that day when you received \$34,000 in official advanced funds of the Drug Inforcement Administration? A Yes.

Q Did you take that money and go to the LaGuardia Airport? A Yes.

Q And did you meet with Check Fong at the airport? A Yes, I did.

Q And at that time did you tell him that you could not travel to Tampa because of all the changes that had been made? A That's right.

Q And that you hadn't been able to get somebody to carry the money for you? A That's right.

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Q Did you show him the \$34,000 that day?

A Yes, I did.

Q And did Mr. Fong tell you that he had to contact his connection and it would probably be a couple of weeks before the heroin could be brought into the New York area?

A That's right.

Q Did you tell him that if he could provide heroin of the same quality that he had previously sold to you that you would purchase several pounds of it?

A Yes.

Q I direct your attention now to June 29, 1976, did Check Fong call you at about 8:30 in the evening?

A Yes, he did.

Q And at that time did you tell him that you wanted to purchase hereoin from him the next day?

A Yes.

Q And that you would be willing to travel to Tampa, Florida, to purchase the heroin?

A Yes.

Q About 12:00 o'clock midnight that day, did Fong call you and tell you that he had talked with his connection and that it was all right to purchase the half pound of heroin on the following day in Tampa, Florida?

A That's right.

Q Did he agree upon a price of approximately \$17,000 for the half pound?

A Yes, 17,000.

Q I direct your attention to the next day, June 30, 1976, did you obtain \$17,190 of official advanced funds



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from the Drug Enforcement Administration? A Yes.

Q And was the \$190 to go towards the purchase of a round trip ticket to Tampa? A That's right, for Fong.

Q And had you in your earlier discussions agreed to buy the ticket for Fong to travel to Tampa, Florida? A Yes, I had.

Q Did you go to the Eastern Airlines Terminal that day? A Yes, I did.

Q And did you see Fong standing in the terminal when you got there? A Yes.

Q And after you got a ticket for Fong and yourself did you talk with him and did he tell you in substance everything was set for the purchase of the half pound in Tampa? A Yes.

Q Also that day, did another special agent of the Drug Enforcement Administration purchase a ticket for the same plane flight down to Tampa? A Yes.

Q Is the agent's name Kibble, K-i-b-b-l-e? A Yes, Kibble.

Q And did he and Fong eventually get on the plane to go to Tampa, Florida? A Yes.

Q And after you got on the plane, did you notice another gentleman who appeared to be in the company of Mr. Fong? A Yes.

Q And did you subsequently learn the name of that individual, the true name? A Yes.

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Q And is that individual's true name, to your knowledge Charlie Prateepmanowong, P-r-a-t-e-e-p-m-a-n-o-w-o-n-g?

A Yes.

Q And during the period that you have had contact with this individual was he also known at times as Charlie?

A Yes.

Q And he was also known at times as Chan Kwok, C-h-a-n K-w-o-k?

A Yes.

Q This individual who I will refer to as Chan Kwok throughout the remainder of your testimony, did you observe that he took the seat beside, directly behind you and Mr. Fong?

A Yes.

Q And did you also observe Special Agent Kibble on the flight?

A Yes.

Q And after you got seated did you tell Fong that you had your man holding the \$17,000 and that he was on the flight?

A Yes.

Q And did you eventually land in Tampa?

A Yes.

Q Did you go to a parking garage area after you got off the plane?

A Yes.

Q That is yourself, Kibble and Fong?

A That's right.

Q Now, after you went to the parking garage, did you get off an elevator on a level of that parking garage?

A Yes.

Q



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Q And at that time, did Fong introduce the man who I am referring to as Chan Kwok to you? A Yes.

Q And did he introduce another oriental male? A Yes.

Q And did you subsequently learn the true name of that other oriental male? A Yes.

Q And is his true name Chakk, C-h-a-k-k Rip, R-i-p Gittisriboongul, G-i-t-t-i-s-r-i-b-o-o-n-g-u-l?

A Yes.

Q Is he also known as Chakkrit Gittesriboongul?

A Yes.

Q That's C-h-a-k-k-r-i-t G-i-t-t-e-s-r-i-b-o-o-n-g-u-l. And did you have a conversation with those three individuals? A Yes, I did.

Q Did they tell you that the purchase would take place at a restaurant away from the airport?

A Yes.

Q Now at first, did you voice objections to that?

A Yes.

Q Now after the conversation at the appointed time did you show Chan Kwok and Gittisriboongul the \$17,000 of official advanced funds that you had switched into your bag? A Yes, 17,000.

Q And at that time did Gittisriboongul tell you that another man would bring the package to the restaurant and did you agree that you would go to the restaurant;

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that is Special Agent Kibble and Mr. Fong would take one taxi and the other gentleman would take another taxi cab and you would follow them to a Chinese restaurant?

A Myself, Fong and Kibble were to take one cab and the other two orientals took one cab.

Q And did you pull up thereupon to a restaurant by the name of Tung-Tung, T-u-n-g dash T-u-n-g?

A Yes.

Q Did you tell Agent Kibble at that time to go back to another restaurant which you had passed and to hold the money and wait at the bar of that restaurant?

A Yes.

Q At that time, did he, Fong, Chan Kwok and Gittis-riboongul go into the Tung-Tung Restaurant?

A Yes, we did.

Q And did you ask where the heroin was?

A Yes.

Q And did he say that Gittisriboongul had made a 'phone call and the heroin would be there? A Yes.

Q And at that time did you learn that instead of the eight ounces that had been agreed upon, they only had six ounces of heroin to sell? A Yes.

Q After some discussion did you agree to take the six ounces? A Right.

Q And after this discussion they did lower the price to \$13,500 for the six ounces? A Yes.



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Q After this discussion did you and Gittisriboongal get up and leave the table for the eight ounces you had purchased after placing a call for someone to get the heroin?

A Yes, we did.

Q And did he come back to the table and about in five minutes later did another oriental male approach the table you were sitting at with those other gentlemen?

A Yes.

Q Did he have in his hands a set of car keys on a large ring?

A Yes.

Q Did he give those keys to Gittisriboongal?

A Yes, he did.

Q Have you subsequently learned the true identity of that individual who brought the car keys back to Gittisriboongal?

A Yes, I have.

Q Is his true name Terradaj, T-e-r-r-a-d-a-j Cachench, C-a-c-h-e-n-c-h? A Yes, T-e-r-r-a-d-a-j Kachenchai, I thought the spelling was K-a-c-h-e-n-c-h-a-i.

Q Which phonetically -- Kachenchai?

A Yes.

Q Now, after Gittisriboongul got the keys did you and Gittisriboongul go outside and enter a Cadillac that was parked outside the restaurant?

A Yes,

we did.

Q When you got into the car did he reach underneath the back passenger seat and pull out a package that was

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contained in a red, white and blue plastic bag?

A Yes.

Q And at that time did Fong come out and enter the back seat of the car?

A Yes.

Q And did you open the bag and notice a large quantity of white powder?

A Yes.

Q Did the plastic bag have a brand name on it?

A Yes, it did.

Q And was that name Double Uoglobe?

A Yes, it was.

Q U-o-g-l-o-b-e?

A Right.

Q Can you tell the Jury what Double Uoglobe is?

A It is a brand name of the heroin that is made in southeast Asia in the Golden Triangle, and comes from a laboratory there and they had named it with their own brand name.

Q After you saw the package, did you inspect it and tell Gittisriboongul that the agent who had been introduced to him as Jimmy, was waiting down the road with the money?

A Yes, I did.

Q And as Gittisriboongul was about to drive away, did you observe the man later identified as Kachench attempt to get into the car?

A Yes.

Q Did you object to that stating that you didn't want anyone but Gittisriboongul and Fong in the car when the money was exchanged?

A Yes.

Q



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Q And did he, Gittisriboongul, tell this unidentified individual, that is the individual who then was unidentified, to wait there while you went to get the money?

A Yes.

Q Did you drive to the parking lot of this restaurant where Kibble was?

A Yes, we did.

Q And thereafter was a payment of \$13,500 made?

A Yes, it was.

Q Was there a discussion about the narcotics business and the transactions among you, Fong and Gittisriboongul?

A Yes.

Q Mr. Toal, I direct your attention now to July 28, 1976, were you on duty that day?

A Yes, I was.

Q And did you drive to Allen Street just south of East Houston Street in New York and park?

A Yes,

I did.

Q And did you get out of your car and meet Mr. Fong?

A Yes.

Q Did he hand you at that time a small piece of white paper held together with Scotch Tape containing a small amount of white powder?

A Yes, he did.

Q By the way, was the package that you received in Florida, that you have just testified about, was a chemical analysis performed on the substance contained in that package?

A Yes, it was.

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Q And have you been informed that the package, upon chemical analysis proved to contain 155.68 grams of 90.4% pure heroin?

A Yes.

Q Now back to July 28, 1976, was a chemical analysis performed on the substance contained in the package that Fong gave you that day?

A Yes.

Q And were you informed that the chemical analysis showed that the sample contained .43 grams of 34% pure heroin?

A Yes, 34% pure heroin.

Q And at that time did you have further conversations with Mr. Fong about the narcotics business and possible future transactions?

A Yes, I did.

Q Now I direct your attention to August 2, 1976, did Fong call you on that day and did you agree to purchase six ounces of pure heroin for \$15,500 at approximately 9:00 o'clock that evening?

A Yes.

Q And at approximately 9:00 o'clock that evening, did you and another agent, that is your Group Supervisor, Esal Vanina, E-s-a-l V-a-n-i-n-a, go to Allen Street, south of East Houston Street in New York City?

A Yes, we did.

Q And after you got there did Mr. Fong come and get into your car?

A Yes, he did.

Q And at that time did Fong tell you he wanted you to drive to Queens?

A Yes.

Q Where he said the heroin was?

A That's right.



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Q And had you previously obtained approximately \$15,500 of advanced funds in order to be able to show to Mr. Fong as a supposed purchase price for the heroin?

A Yes.

Q And did Fong direct you to a parking lot located on 92nd Street between 57th and 59th Avenue in Queens, New York?

Q Did he tell you at that time to accompany him to a car that was parked in the parking lot across the street?

A Yes.

Q Did he tell you that was where you would get the heroin?

A That's right.

Q Did you enter the parking lot and go towards a 1976 white Monte Carlo?

A Yes.

Q And did you observe another oriental male sitting in the front driver's seat of that vehicle?

A Yes,

I did.

Q Has that individual been subsequently identified as Milton Liu, L-i-u?

A Yes.

Q At that time did Mr. Fong walk up to the car and open the passenger door?

A Yes, he did.

Q And at that time did Mr. Liu, sitting in the driver's seat, nod to Mr. Fong?

A Yes, he did.

Q And at that time did Mr. Fong reach into the glove compartment and take out a brown paper bag and hand it to you?

A Yes, he did.

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Q Did you look into the bag and see that there were a few small bags inside containing a white powder?

A Yes.

Q And did you and Fong walk into where you had parked your government vehicle, and where your group supervisor was waiting?

A Yes.

Q Did you hand your group supervisor the brown bag and tell Mr. Fong to take the money from the trunk?

A Yes.

Q Did you then take off your jacket, which was a pre-arranged signal for your surveillance agent?

A Yes.

Q Did the surveillance agent then effect the arrest of yourself, Mr. Fong and the group supervisor?

A Yes.

Q That is the arrest of yourself and your group supervisor was a feigned arrest in order to avoid disclosing your under cover capacity, is that right?

A That's right.

Q And have you subsequently been informed that a chemical analysis was performed on the contents of the package which you obtained that day from Fong and Mr. Liu?

A Yes.

Q And did that analysis reveal that the package contained 182.20 grams of 68% pure heroin?

A Yes.



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MR. SEAR: I ask that the witness be temporarily excused.

FOREMAN : You may temporarily be excused.  
Please wait outside. (WITNESS EXCUSED)

MR. SEAR: Now I want to advise you of two things, well one thing in particular, that is that some of the testimony that you have heard today is hearsay. Hearsay testimony, that is this agent has related to you things which he was told by other people, specifically what he was told about the chemical analysis of the various packages about which he testified and more of this testimony has been what we call direct, testimony he has told you about what happened on particular occasions and also what he has told you about various people during the transactions, what they said. That is not hearsay testimony. But in each case where he has given hearsay testimony, if you do deem it necessary we could call the chemist before you, but I want to advise you that it is perfectly proper for you to consider the hearsay testimony that he has presented to you.